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TRANSCRIPT OF RECORD

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M. & S. C.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 87

WILLIAM D. FRAD, PETITIONER,

vs.

JOHN J. KELLY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 87

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—against—

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD,

Relator-Appellee.

Statement Under Rule 13, Subdivision 4

This is an appeal by the respondent John J. Kelly, United States Marshal for the Southern District of New York, from two orders dated January 26, 1937 sustaining a writ of habeas corpus, discharging the relator from custody and denying a motion to sentence the relator-appellee, William Frad.

On March 21, 1934 the case of United States versus William Frad, with aliases, was referred to the Honorable Robert A. Inch for trial on Indictments C 80-944, C 96-116 and C 96-120, charging a series of crimes involving the concealment of his identity over a period of years for the purpose of carrying on his activities as a card sharp on the high seas. After the case had been moved for trial the relator withdrew his plea of not guilty and entered a plea of guilty to the three indictments before Judge Inch and a jury.

On March 26, 1934 relator was sentenced on Indictment C 96-116 to two years imprisonment and to pay a fine of $1000 and on Indictment C 80-944

and C 96-120 the imposition of sentence was suspended and the relator placed on probation for a term of four years to begin after he had served the sentence on Indictment C 96-116,

On November 2, 1935 relator was discharged from the penitentiary and entered his term of probation, reporting weekly at the probation office for the Southern District of New York.

On December 13, 1935 notice was given to E. Fred Sweet, Chief Probation Officer for the Southern District of New York, "That on December 16, 1935, at 10:30 o'clock in the forenoon of that day, in the United States District Court for the Eastern District of New York, at the Federal Building, Brooklyn, New York, an application for the within order to discharge William Frad from probation and from further supervision and to terminate the proceedings against him in this case will be made to the Honorable Robert A. Inch, United States District Judge for the Eastern District of New York." On December 16, 1935 an order was entered by Judge Inch sitting in the Eastern District of New York revoking probation and terminating the proceedings against the relator.

On November 19, 1936, a complaint was filed against relator for larceny on the high seas, by W. J. McNulty, Special Agent in the Federal Bureau of Investigation. On November 20, 1936, an order was signed by Honorable Francis G. Caffey United States District Judge for the Southern District of New York, for the "issuance of a warrant to apprehend probationer * * * for violation of one of the terms of his probation" on which the relator was arrested and taken into custody by John J. Kelly, United States Marshal for the Southern District of New York.

Statement Under Rule 13, Subdivision 4

On December 3, 1936, relator was notified that Indictments C 96-120 and C 80-944 would be on the 7
calendar for sentence on December 8, 1936. A motion noticed on December 2, 1936 to resettle aforesaid order of Judge Inch dated December 16, 1935 was made returnable December 8, 1936. On the return date, no order was entered on the hearing for resettlement before Judge Inch and no hearing was held on the calendar motion to sentence; inasmuch as on December 4, 1936 a writ of habeas corpus had been allowed by Judge Caffey.

After allowance of writ, the Honorable William Bondy, United States District Judge for the Southern District of New York, released relator from 8
custody on $5,000 bail pending disposition of said writ of habeas corpus. On December 21, Judge Bondy heard the arguments on the writ and on December 28, he heard the arguments on the motion to sentence.

On January 27, 1937, two orders were filed by relator based on Judge Bondy's opinion of January 13, 1937. On January 28, 1937, two notices with grounds of appeal under Rule 3, Supreme Court Rules, were filed and for the purposes of this appeal are consolidated herein.

On January 29 and on January 30, 1937, two 9
petitions for appeal and orders allowing appeal were filed in the alternative and citation issued returnable February 27, 1937. The alternative appeal papers are not printed in this record.

Indictment (C80-944)

10 *In the District Court of the United States for the Southern District of New York*

Southern District of New York, ss: The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about August 12, 1929, at the Southern District of New York and within the jurisdiction of this Court, William Frad,
11 alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly did, when reentering the United States, use or attempt to use a passport of the United States, to wit, Passport #530957, which was issued on or about April 10, 1928, in consequence of a false statement made by the said defendant in an application therefor, dated on or about April 16, 1928, to wit, that in said application, and in and about the making thereof, the said defendant concealed his true identity, and falsely represented himself to be "Fred Warren Gorham," against the peace of the
12 United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 1917, C. 30, Title IX, Section 2, U. S. C. C.; Title 22, Section 220, U. S. C.).

SECOND COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit,

on or about August 12, 1929, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly did, when re-entering the United States, use or attempt to use a passport of the United States, to wit, Passport #530957, issued on or about April 18, 1928, which was issued and designed for the use of another than himself, to wit one Fred Warren Gorham, whose identity is to the grand jurors unknown, that is to say, that the said defendant when reentering the United States, as aforesaid, falsely stated to the immigrant inspector that he was the aforesaid Fred Warren Gorham, and did thereupon present the said passport; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 191 c. 30, Title IX, Section 3, U. S. C. C.; Title 22, Section 221, U. S. C.).

THIRD COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about April 30, 1930, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly did, when reentering the United States, use or attempt to use a passport of the United States, to wit, Passport #167, which was issued on or about April 15, 1930, in

consequence of a false statement made by the said
16 defendant in an application therefor, dated on or about April 15, 1930, to wit, that in said application and in and about the making thereof the said defendant concealed his true identity and falsely represented himself to be "Fred Warren Gorham"; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 1917, c. 30, Title IX, Section 2, U. S. C. C.; Title 22, Section 220, U. S. C.).

17 FOURTH COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about April 30, 1930, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly, did, when reentering the United States, use or attempt to use a passport of the United States, to wit, Passport #167, issued on or about April 15, 1930, which was
18 issued and designed for the use of another than himself, to wit, one Fred Warren Gorham, whose identity is to the grand jurors unknown, that is to say, that the said defendant when reentering the United States, as aforesaid, falsely stated to the immigrant inspector that he was the aforesaid Fred Warren Gorham, and did thereupon present the said passport; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case

made and provided. (40 Stat. 227, June 15, 1917, c. 30, Title IX, Section 3, U. S. C. C.; Title 22, Section 221, U. S. C.).

FIFTH COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about April 15, 1930, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly, at the American Consulate at Nice, France, in and about the making of an application for a passport of the United States, to wit, Passport #167 and with intent to induce or secure the issuance of said passport under the authority of the United States, for his own use, did falsely conceal his true identity and did falsely represent himself to be "Fred Warren Gorham," contrary to the laws regulating the issuance of passports and the rules prescribed pursuant to such laws; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 1917, c. 30, Title IX, Section 2, U. S. C. C.; Title 22, Section 220, U. S. C., 36 Stat. 1100, R. S. Sec. 730, Mar. 3, 1911, c. 231, Sec. 41, U. S. C. C.; Title 28 Sec. 102 U. S. C.).

GEORGE Z. MEDALIE,
United States Attorney.

Endorsements on Indictment (C-80-944)

22

FEB 6-1934 *Pleads Not Guilty*
Filed in open Court, the
MAR 21 1934 Before Inch. J.
Deft pleads guilty
Sentence adjourned to Mar 26, 1934.
Bail Cont'd
MAR 26 1934

Imposition of sentence suspended. Probation for 4 years, to begin after serving sentence on C 96-116

23 SUBJECT TO THE STANDING PROBATION ORDER OF THIS COURT.

Inch, J,

S

C 80-944

U. S. DISTRICT COURT

THE UNITED STATES OF AMERICA

vs.

24 WILLIAM FRAD, alias "Wm. D. Frad", alias "Fred Warren Gorham"
see 96-120
" 96-116.

INDICTMENT

Using a passport designed for one other than the defendant and obtained in consequence of a false statement; and making a false statement in an application therefore.

Title 22, Sec. 221, Sec. 220; Title 28, Sec. 102 U. S. C.

GEORGE Z. MEDALIE,
U. S. Attorney.

A TRUE BILL

LOUIS CASTAYNETTA,
Foreman.

JUN 16 1931

SAMUEL C. BAUM
Secy.

Indictment (C-96-116)

In the District Court of the United States of America for the Southern District of New York

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, beginning on or about April 16, 1928, and continuing on each and every day thereafter down to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, and divers other persons not named herein as defendants, whose true names are to

the grand jurors unknown, unlawfully, wilfully
28 and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States. to wit, to violate Section 220 of Title 22, United States Code, in that the said defendant did unlawfully, wilfully and knowingly conspire with two of the unknown persons using the names Albert H. Gorham and Harry J. Wilson to make false statements in applications for passports with intent to induce and secure the issuance thereof under the authority of the United States for the use of said
29 defendant and other persons to the grand jurors unknown, contrary to Sections 211 and 227 of Title 22, United States Code, as amended, regulating the issuance and use of passports and the rules prescribed by the Secretary of State of the United States pursuant to such laws, and to use said passports so obtained by reason of the aforesaid false statements; and that the defendant did do acts in the Southern District of New York and within the jurisdiction of this Court to effect the object of the conspiracy.

It was part of said conspiracy that said defendant
30 William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, was to procure for his own use a passport issued by the United States by means of false oral representations and by means of false statements contained in an application for said passport, to an agent of the Department of State of the United States.

It was further a part of said conspiracy that

said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, 31
alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, would submit with his application for American passport, to said agent of the Department of State of the United States, an affidavit of birth subscribed and sworn to by a person professing to be Albert H. Gorham, said affidavit stating that said Albert H. Gorham had known the applicant, said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias 32
Edward Daniel Swift, alias Frederick L. Price, for forty-seven years, and that said affiant Albert H. Gorham was a brother of said applicant.

It was further a part of said conspiracy that said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, would submit an application for a passport of the United States, and that a person professing to be Harry J. Wilson would make an affidavit in behalf of the application of said defendant, as an 33
identifying witness, stating that he had known the applicant for five years. and that the statements made to the agent of the Department of State by said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, under the name of Fred Gorham, were to the best of his knowledge and belief true.

34 It was further a part of said conspiracy that said defendant WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, would make an affidavit of birth under the name of Frederick L. Price, in behalf of a Charles William Davis in order that said Davis might obtain a passport of the United States for the use of said Charles William Davis.

35 It was further a part of said conspiracy that said defendant WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, was to use the passport thus secured by reason of false statements, as aforesaid, to make numerous and divers trips on the various transatlantic vessels with said Charles William Davis and divers other persons, to obtain money and property and other things of value from divers and sundry passengers by means of false and fraudulent pretenses and representations and other unlawful and dishonest means.

36

OVERT ACTS

1. In furtherance of said conspiracy and to effect the objects thereof, on or about May 2, 1931, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick

Endorsements on Indictment (C96-116)

L. Price, did purchase a ticket for passage on the S. S. "Europa". 37

2. And further in pursuance of said conspiracy and to effect the objects thereof, on or about June 2, 1931, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, *did present a* passport of the United States, to wit, Passport No. 167, to an officer of the United States Government. 38

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 88, Title 18, United States Code.)

MARTIN CONBOY,
United States Attorney.

Endorsements on Indictment (C96-116)

FEB 28 1934 *Pleads Not Guilty* 39
Bail in Indict C 80-944
Filed in open Court, the
to cover this Indictment JJ

MAR 21 1934 Before Inch J.

Deft pleads guilty
Sentence adjd to
Mar 26, 1934. Bail Contd

Endorsements on Indictment (C96-116)

MAR 26 1934, the Defendant
40 Sentenced to—2 years, and fined $1,000. Deft. to stand committed until fine is paid or he is otherwise discharged by law.

Place of confinement to be designated by the Atty General.

Inch, J. JJ

May 9th 1934
Paid $449.15 on Account
May 23rd 1934
Paid $550.85 balance

all paid
41 RB

96-116

#34035
S

U. S. DISTRICT COURT

THE UNITED STATES OF AMERICA

vs.

42

WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price

See C 96-120
" C 80-944

INDICTMENT

Conspiracy to obtain and use a passport, the issuance of which was secured by reason of false statements.

Section 88, Title 18 U. S. C.

MARTIN CONBOY
U. S. Attorney.

A TRUE BILL

C. DOUGLASS GREEN
Foreman.

Indictment (C96-120)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about the 6th day of September, 1932, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred

Warren Gorham, alias Fred Gorham, alias Ed-
46 ward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the
47 United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

SECOND COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 23rd day of May, 1933, at the Southern District of New York and within the jurisdic-
48 tion of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the

Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

THIRD COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 3rd day of October, 1933, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

FOURTH COUNT

52

And the grand jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 27th day of October, 1933, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United
53 States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

54

MARTIN CONBOY,
United States Attorney.

Endorsements on Indictment (C96-120)

MAR 7 1934 *Pleads Not Guilty* 55
Bail to be re-written to cover this Indict. (See C 80/944 & 96/116)
JJ

MAR 21 1934 Before Inch J.
Deft. pleads guilty
Sentence adjourned to Mar 26, 1934
Bail Cont'd

MAR 26 1934
Imposition of sentence suspended.
Probation for 4 years, to begin after serving sentence on C 96-116 56

SUBJECT TO THE STANDING PROBATION ORDER OF THIS COURT.

JJ

Inch, J.

NOV 21 1936

appearing same
Deft arraigned for violation of probation.
Pleads Not Guilty to violation of probation 57
Bail $5000. Remanded.

Goddard J.
S

DEC 4-1936
Deft. surrendered by his attorney.
Remanded.

Bondy, J. JJ

Endorsements on Indictment (96-120)

C 96/120

58

U. S. DISTRICT COURT

THE UNITED STATES OF AMERICA

vs.

WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price

59

See 96-116
" 80-944

INDICTMENT

Personating another when applying for admission to the United States.
Section 22, Subdivision (b), Immigration Act of 1922. Sec. 220 of Title U. S. C.

60

MARTIN CONBOY
U. S. Attorney.

A TRUE BILL

C. DOUGLASS GREEN
Foreman.

Minutes of Proceeding before Hon. Robert A. Inch on March 21, 1934

61

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *vs.* WILLIAM FRAD, alias Wiliam D. Frad, alias Fred Warren Gorham (and other aliases).	C-80-944 C-96-116 C-96-120

62

Before:

HON. ROBERT A. INCH,
District Judge, and a Jury.

New York, March 21, 1934.

Appearances:

MARTIN CONBOY, Esq., United States Attorney, for the Government; 63

J. F. Dailey, Esq.,
F. W. H. Adams, Esq., and
Curtis C. Shears, Esq.,
Assistant U. S. Attorneys,
of Counsel.

MOSES POLAKOFF, Esq.,
Attorney for Defendant.

Minutes of Proceeding before Hon. Robert A. Inch on March 21, 1934

64 Mr. Dailey: The defendant pleads guilty.
Mr. Polakoff: To three indictments.
The Court: I can continue the bail?
Mr. Polakoff: He is under $3,000 bail.

(The clerk takes the plea of guilty of the defendant as to the three indictments.)

Mr. Polakoff: Will your Honor defer sentence until Monday?

The Court: I will continue him on bail. There is no objection?

65 Mr. Dailey: No.

The Court: Yes, Monday at 10:30. In the meantime I would like to see Mr. Polakoff and representatives of the United States Court in regard to any information that they want to bring to me about the sentence.

Mr. Polakoff: Monday morning?

The Court: Yes, come back Monday.

66

Conditions of Probation

DISTRICT COURT OF THE UNITED STATES 73

SOUTHERN DISTRICT OF NEW YORK

To—William Frad . Docket No.—C96-120

(Address)—25 Central Park West, N. Y. C.

In accordance with authority conferred by the United States Probation Law, you have been probationed on this date, 3/26/34, for a period of 4 yrs. by the Hon. Robert A. Inch, United States District Judge, sitting in and for this District Court at New York City. 74

It is the order of the Court that you shall comply with the following general and special conditions of probation. The general conditions are as follows: (a) Refrain from the violation of any State and Federal penal laws. (b) Live a clean, honest and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your Probation Officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the Probation Officer. Notify your Probation Officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the Probation Officer's instructions and advice. The Probation Law gives him authority to instruct and advise you regarding your recreational and social activities. (i) Report promptly on the dates set forth. If for any unavoidable reason you are 75

Conditions of Probation

unable to do so, communicate with your Probation
76 Officer without delay.

The special conditions ordered by the Court are as follows:

(STAMP—Subject to the standing probation order of this court.)

Probation to commence at expiration of prison sentence.

You are hereby advised that under the law the Court may at any time revoke or modify any con-
77 dition of this probation or change the period of probation. If the Court sees fit, it may discharge you from probation at any time from further supervision, or it may extend your period of probation. You shall be subject to arrest, for cause, upon order of the Court, or without order, for cause, by the Probation Officer. At any time within the period of your probation, or within the maximum period for which you might originally have been sentenced for the offense for which you were convicted, the Court may, if it sees fit, for cause, impose the sentence which it might have imposed in the first in-
78 stance.

The Court has placed you on probation, believing that if you sincerely endeavor to obey and live up to the conditions of your probation, your attitude and conduct will improve both to the benefit of the United States and to yourself.

You will report as follows: Weekly at Probation Office.

(Signed)—Wm. D. Frad — *Probationer*

Elbert H. Williams — *Probation Officer*

Nov. 15, 1935

Notice of Motion for Order of Judge Inch, Dated December 16, 1935

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, —*against*— WILLIAM FRAD,	Indictments Nos. C-96-116 C-80-944 C-96-120

SIR:

PLEASE TAKE NOTICE that on December 16, 1935 at 10:30 in the forenoon of that day in the United States District Court, for the Eastern District of New York, at the Federal Building, Brooklyn, New York, an application for the within order to discharge William Frad from probation and from further supervision and to terminate the proceedings against him in this case will be made to the Honorable Robert A. Inch, United States District Judge of the Eastern District of New York.

Dated, New York, December 13th, 1935.

Yours, etc.,

LOUIS KARASIK,
Attorney for Petitioner,
Office & P. O. Address,
50 East 42nd Street,
Borough of Manhattan,
City of New York.

To:

HON. E. FRED SWEET,
Chief Probation Officer,
Southern District of New York,

Off At Bottom

Order of Judge Inch, Dated December 16, 1935

82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, *—against—* WILLIAM FRAD,	Indictments Nos. C-96-116 C-80-944 C-96-120

83

An order having been made and filed herein on or about the 26th day of March, 1934, by the Honorable Robert A. Inch, then duly assigned to a criminal term in and for the Southern District of New York and by which the defendant was in addition to a sentence and fine, placed on probation for a period of four years to begin after service of the sentence in accordance with the act of Congress approved March 4, 1925, entitled "An act to provide
84 for the establishment of a probation system in the United States except in the District of Columbia" and Acts amending this provision and the defendant William Frad having applied to the Court on the 16th day of December, 1935, for an order to discharge him from probation and from further supervision and that the proceedings against him in this cause be terminated and the defendant having submitted his petition wherein it appears that he is suffering from angina pectoris and that the

probationery status has produced a mental condition which fact is further attested by Dr. Rieder of 85
the New York Bellevue Medical School, and due notice having been given to the Honorable E. Fred Sweet, Probation Officer for the Southern District of New York, and due deliberation having been had thereon, it is

ORDERED, that the order of probation made herein *on the* 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him 86
in this cause be, and the same are hereby terminated.

Dated, New York City, December 16, 1935.

ROBERT A. INCH,
U. S. D. J.

87

Complaint of W. J. McNulty, Dated November 19, 1936

88

Approved:

CURTIS C. SHEARS,
Assistant United States Attorney.

Before:

HONORABLE GARRET W. COTTER,
United States Commissioner for the Southern District of New York.

89

UNITED STATES OF AMERICA, *—against—* WILLIAM D. FRAD, alias Edward Swift, alias Fred W. Gorham, W. WILLIS DAY and SAMUEL J. KOVEN, Defendants.	COMPLAINT: Larceny on the High Seas—Violation of Sec. 287, U.S.C.C.

90 Southern District of New York, *ss.*:

W. J. McNULTY, being duly sworn, deposes and says that he is a Special Agent in the Federal Bureau of Investigation, Department of Justice and upon information and belief alleges as follows:

That heretofore, to wit, on or about the eighth day of November, 1936, upon the S/S Santa Rosa of the Grace Line, said vessel at the time aforesaid

being operated by the Grace Steamship Company, 91
a corporation existing and by virtue of the Laws of the State of New York, and while said vessel was on the high seas and within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, the above named defendants did take and carry away with intent to steal and purloin certain personal property belonging to Paul K. Richter, of New York, N. Y., exceeding in value Thirty Thousand ($30,000.) Dollars; against the peace of the United States and their dignity and contrary to 92
the form of the statute of the United States in such case made and provided.

The sources of deponent's information and the grounds of his belief are investigations made by him in the course of his official duties.

That the above defendants are to be found in the Southern District of New York and within the jurisdiction of this Court.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above named defendant and that he may be imprisoned or bailed 93
as the case may be.

W. J. McNULTY.

Sworn to before me this
19th day of November, 1936.

(signed) GARRET W. COTTER,
United States Commissioner,
Southern District of New York.

Order for Issuance of Warrant to Apprehend Probationer, Dated November 20, 1936.

94

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *vs.* WILLIAM FRAD, Defendant.	Docket No. C-96-120

95

Order fo Issuance of a Warrant to Apprehend Probationer.

It appearing to the said Court that on March 26th, 1934, this Court suspended sentence on the above-named Defendant and placed him on probation pursuant to the Act of March 4, 1925, and that the above-named Defendant has violated one of the terms of his probation, that is: he has committed larceny by trick on the high seas.

96

NOW, THEREFORE, It is ordered that a warrant issue for the arrest of said probationer William Frad.

Dated, New York City, November 20, 1936.

FRANCIS G. CAFFEY,
Judge of U. S. District Court.

Petition for Revocation of Probation and Resentence, Dated November 20, 1936.

97

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

WILLIAM FRAD,

Defendant.

C-96-120

98

To the Honorable Francis Caffey, Judge of the District Court of the United States for the Southern District of New York:

The petition of E. Fred Sweet, Chief Probation Officer for the District Court of the United States for the Southern District of New York, respectfully shows to this Court:

that on March 26th, 1934, the herein named Defendant was placed on probation for 4 years to follow a penitentiary sentence of 2 years on indictment 96-116, said probation sentence being for violation of the Immigration Act of 1922

99

that he has again returned to his criminal profession of card sharper on the high seas

100 that he has associated with persons of ill repute

Your petitioner's information and belief are based upon a complaint filed on November 19th, 1936, by Assistant United States Attorney Curtis C. Shears, and investigations of the Federal Bureau of Investigation. Your petitioner therefore respectfully requests that the probation of the said probationer William Frad be revoked, and that a warrant issue for his arrest, and that this petition be
101 granted.

Dated, New York, November 20, 1936.

E. FRED SWEET,
Petitioner.

E. FRED SWEET, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that
102 as to those matters he believes them to be true.

E. FRED SWEET

Sworn to before me this
20th day of November, 1936.

(NOTARIAL SEAL)

FLORENCE SWEET,

Florence Sweet,
Notary Public, New York County No. 648
Commission Expires March 30, 1938.

Notice of Motion to Vacate Order

UNITED STATES DISTRICT COURT 103

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, —*against*— WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, Defendant.	C-80-944 C-96-120

104

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 1st day of December, 1936, and upon all the proceedings heretofore had in this action, the undersigned will move this Court in Room 318 of the United States Court House, Foley Square, New York, on the 8th day of December, 1936, at 10:30 in the forenoon or as soon thereafter as counsel may be heard to set aside an order 105 entered in this cause on the 16th of December, 1935, signed by Honorable Robert A. Inch, United States Judge for the Eastern District of New York, and for such other, further and different relief as to the Court may seem just and proper.

Notice of Motion to Vacate Order

Dated: New York, N. Y., December 2nd, 1936.

106

LAMAR HARDY,
United States Attorney,
Southern District of New York,
Attorney for Plaintiff,
Office & P. O. Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

TO:

107 LOUIS KARASIK, Esq.,
50 East 42nd Street,
New York City.

108

Affidavit of Curtis Charles Shears of December 1, 1936

109

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *—against—* WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, Defendant.	C-80-944 C-96-120

110

State of New York,
County of New York,
Southern District of New York, *ss.*:

CURTIS CHARLES SHEARS, *being duly sworn, deposes and says* that he is an Assistant United States Attorney for the Southern District of New York in charge of the above mentioned cases.

That on June 16, 1931, an indictment was filed, C-80-944, charging above defendant with violations 111
of Sections 220 and 221, Title 22 of the United States Code, and Section 102, Title 28 of the United States Code, on February 27, 1934, indictment C 96-116 was filed, charging violations of Section 88, Title 18, United States Code, and on March 2, 1934, indictment C 96-120 was filed, charging violations of Section 220, Title 8, United States Code, and Section 22, subdivision (b) of the Immigration Act of 1922.

On the 26th day of March, 1934, the day of trial, defendant pleaded guilty to all three indictments

112 before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting at a term of Court in and for the Southern District of New York. Judge Inch sentenced the defendant on indictment C 96-116 to two years imprisonment and to pay a fine of $1000, for which he was to stand committed until the fine was paid. On indictments C 80-944 and C 96-120 Judge Inch suspended the imposition of sentence and placed defendant on probation for four years, to begin after defendant had served the sentence on C-96-116.

113 Pursuant to the aforesaid sentence, defendant was confined in the United States Northeastern Penitentiary, Lewisburg, for the term of two years, less allowance for good behavior, and paid the aforesaid fine. On November 2, 1935, petitioner was discharged from the aforesaid penitentiary.

On December 16, 1935, after three day notice to the chief probation officer for the Southern District of New York, a hearing was held before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the
114 Eastern District of New York at the Federal Building, Brooklyn, New York, on an application for an order to discharge defendant from probation and from further supervision and to terminate the proceedings against him in this case. An order was submitted with the notice of motion to the following effect:

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is

discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated." 115

This order was signed by Judge Inch on December 16, 1935.

This order was intended to discontinue probation supervision and no more. Any provision to terminate other proceedings in this cause is illegal.

WHEREFORE, deponent prays that so much of the order of December 16, 1935 that purports to do more than discharge the defendant from probation supervision be set aside and a new order entered in this cause and for such other, further and different relief as to the Court may seem just and proper. 116

CURTIS CHARLES SHEARS.

Sworn to before me this
1 day of December, 1936.

LEO COHEN,
Notary Public,
N. Y. Co. Clks. No. 156, Reg. No. 8C169,
Bronx Co. Clks. 13 Kings Co. Clks. 131,
Commission expires March 30, 1938. 117

Notice to Relator

118 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. M. S. 11-25-36

THE UNITED STATES OF AMERICA, *vs.* WILLIAM FRAD,	INDICTMENT C-96-120 C-80-944

119

To Mr. William Frad,
No. 25 Central Park West,

I have to inform you that the indictment against you will be moved for sentence at the District Court of the United States for the Southern District of New York, to be held in Room 318, at the United States Court House, Foley Square, in the City of New York, on Tuesday the 8th day of December
120 instant, at 10.15 o'clock in the forenoon.

If you fail to appear at that time your bond will be forfeited.

LAMAR HARDY,
United States Attorney.

Dated, Dec. 3, 1936.

Notice to Surety

DISTRICT COURT OF THE UNITED STATES 121

SOUTHERN DISTRICT OF NEW YORK

C. M. S. 11-25-36

THE UNITED STATES OF AMERICA,	INDICTMENT C-96-120 C-80-944
vs.	
WILLIAM FRAD, 122	

To U. S. Fidelity & Guaranty Co.
No. 75 William Street,

I have to inform you that the indictment against the above-named defendant, for whose appearance you are bound, will be moved for Sentence, at the District Court of the United States for the Southern District of New York, to be held in Room 318, at the United States Court House, Foley Square, in the City of New York, on Tuesday the 8th day of December instant, at 10.15 o'clock in the forenoon. 123

If the defendant is not produced at that time your bond will be forfeited.

LAMAR HARDY,
United States Attorney.

Dec. 3, 1936.

Hearing in Resettlement, December 8, 1936

124

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *vs.* WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,	C-80-944 C-96-120

125

Before:

HON. ROBERT A. INCH,
District Judge.

New York, December 8th, 1936;
11.30 o'clock a. m.

Appearances:

126

LAMAR HARDY, ESQ., United States Attorney, for the Government;
Curtis C. Shears, Esq., Assistant U. S. Attorney, of Counsel.

LOUIS KARASIK, ESQ., and
JOSEPH G. M. BROWNE, ESQ.,
Attorneys for Defendant.

Mr. Shears: Your Honor, this is on a notice of motion to vacate an order made by your Honor on December 16, 1935. The Government's motion

papers are passed up. Are there any answering papers? 127

Mr. Browne: No. Your Honor, at this time I want to say that I think the practical thing to do is to have your Honor hold this matter in abeyance pending the final determination of a writ of habeas corpus which we have sued out and which is pending before Judge Bondy, in which we are attacking the jurisdiction and the validity of the order which was made by his Honor, Judge Caffey, directing that a warrant issue for the apprehension and arrest of the defendant for an alleged violation of the probation order which was originally made by your Honor back in 1934 and which was subsequently revoked by your Honor, on due application and hearing, and under which order your Honor discharged the defendant from the terms of the probation order, discharging him from further supervision thereunder and terminating the proceedings, and our contention in the application for the writ is that with that order which your Honor made on December 16, 1935, revoking the probation order, terminating probation, relieving the defendant of the supervision and terminating the proceedings, those causes and all proceedings thereunder were finally terminated and at an end. That is the matter we are going to argue out before his Honor Judge Bondy. If we are successful upon that writ, then immediately this proceeding becomes academic, so I offer the suggestion to the Court that this matter be held in abeyance pending the final outcome of the habeas corpus proceeding. 128 129

The Court: What do you say, Mr. Shears?

Mr. Shears: Your Honor, in that behalf, inasmuch as your order of December 16, 1935, is de-

pended upon by counsel in his writ of habeas corpus,
130 it becomes very vital for your Honor to decide what your Honor's intention was at the time of signing that order.

If it was your Honor's intention to modify the sentence that your Honor imposed on March 26, 1934, *then* the Government contends that your action in the Eastern District of New York is *illegal and void. If it* was your Honor's intention at that time, as the Government contends, merely to terminate probation supervision and to discontinue the probationer from reporting to the
131 probation officer, then, of course, we would like to have your Honor's action on that and in such way modify your Honor's order of December 16, 1935, as to make that clear, so that that will not be an issue in the habeas corpus proceedings, which will be heard later on this month.

The Court: Well, all I did was, that Mr. Karasik brought over this man Frad and said that he wanted to be relieved of the probation, that he had served his term in jail, and I was kind of humorous about it, I told him that I did not think that—Mr. Frad will remember that—I did not think that I could
132 reform him if he did not intend to reform at his age, and that I trusted that we would not have any further trouble about the thing. So I was relieving him of probation. I don't know anything more than that.

Mr. Browne: If the Court please, under the terms of the order and according to our contention of the construction and interpretation of the Probation Act, supported by adequate authority, when a probationer has served his time of probation or when he has been relieved of further compliance

therewith, it is tantamount to the Court fixing a definite time when it relieves him therefrom and 133
terminates the proceedings, and our contention is that that jurisdiction of the matter is at an end, not only insofar as your Honor's power to take any further action thereunder is concerned but *insofar* as the general power or jurisdiction of the Court or any judge thereof is concerned.

Our contention is that it has the same effect as if the man had served a sentence.

Now, that is the question before the Court on the habeas corpus proceeding.

I might say that I have been unable to find, from a very intensive research of the law, any ruling in 134
this circuit on that point, and in other circuits and other districts the situation, that is the factual situation, was not the same as it is in the case at bar, in this sense, that in every one of the reported cases where the test was made there had been an actual imposition of a sentence but the execution of the sentence was suspended pending the probation period, and in those cases the question arose whether, if he had violated the terms of the probation during the probation period, there could be no question of the Court's right to re-sentence him. Where the term of probation had expired the ques- 135
tion arose whether the Court then had power to recall him although he had at no time during the probationary period violated the order but had complied therewith. Some of the courts have held that the court still has the power to recall him insofar as the maximum period for which the original sentence might have been imposed has not expired, but they have pointed out, and that is our theory, that where there has never been a

sentence imposed but the imposition of sentence
136 has been suspended, as your Honor did in this case, then if he complies with the terms of the probation order or is excused therefrom, the effect of that, then, is to definitely, legally terminate the proceedings so that the Court has no jurisdiction to re-sentence or vacate the suspension of execution of sentence, but the point is that sentence has not been imposed so he cannot be sentenced, or rather re-sentenced or sentenced if imposition of sentence was suspended and he complied with the terms of the probation order and was then relieved
137 therefrom.

Of course, we have no concretely reported cases on the point where that distinction has been brought. This is a virgin case. The question of the power of the Court under a situation of this kind, so far as my search goes, and I have made a very thorough and intensive research, I do not find that it has ever been the subject of a judicial ruling in any district or by the Circuit Court of Appeals of any Circuit.

The Court: That may be, Mr. Browne, but the point is first to fix my order right, that is all. Now,
138 the order, according to the United States Attorney, goes too far. It not only accomplishes what we thought we were accomplishing, but it entirely terminates the proceeding. It wasn't before me to terminate the proceeding.

Mr. Browne: But I thought—

The Court: Only to take this man off the roll of supervisory probation.

Mr. Browne: Well, if your Honor pleases, even so, our contention is that that is the legal effect of that decision.

The Court: Yes.

Mr. Browne: And I urge this point at this 139
time,—

The Court: Well, I don't care about the effect; I am only talking now about the form of the order.

Mr. Browne: Well, it seems to me—

The Court: You can argue that if I say to a man, you have served two years in jail and now you face *this supervisory* situation, and I agree with you that that may be irksome, that you may want to leave the jurisdiction and that you may have to write once a month and all that kind of thing, I don't know whether you are going to 140
be a good man or bad man, but at your age I can't do anything, I think, to rehabilitate you if you are not willing to do it yourself, consequently I relieve you from that supervisory power or probation. Now, that is all we intended to do. I did not go into the merits of deciding any other rights or merits. That you can argue. I don't know what would be the effect of it.

Mr. Browne: That is all your Honor's order did; all you did under the terms of that order.

The Court: Well, my order, they say, went further than that; it went not only to relieving him 141
of the probationary supervision, but it also terminated the proceeding, which I had no right to do, never intended to do.

Mr. Browne: No, that is not what your Honor said. Your order follows the language of Section 725 in Title 18 of the United States Code.

The Court: I am merely saying what I take from Mr. Shears' statement.

Mr. Browne: No, that is all your Honor's order does. If you will compare the language of the

order with the language of Section 725 of Title 18
142 of the United States Code, you will find that that is what it does. I have the Code here, your Honor, and I will read you the provision and you will find that your order follows that.

There is another point that I want to urge at this time, your Honor, and that is the question of jurisdiction, the question of term time, as to whether your Honor has power at this time to change the order after the term of the Court has expired. While I only press that as a sort of a supplementary—

The Court: You came over in the Eastern Dis-
143 trict getting that jurisdiction; it doesn't lie very well in your mouth to say now that I can't make the order.

Mr. Browne: I don't mean it in that sense at all. I urge it as a supplementary proposition to preclude the United States Attorney from jeopardizing any rights that we may have by virtue of our habeas corpus proceeding.

Now, your Honor, this Section under which you made this order, and your order follows substantially this, literally, the language of the section
144 reads as follows: "When directed by the Court the probation officer shall report to the Court with a statement of the conduct of the probationer while on probation. The Court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him or may extend the probation, as shall seem advisable. At any time within the probation period the probation officer may arrest the probationer without a warrant or the Court may issue a warrant for his arrest. Thereupon such probationer shall forthwith

be taken before the Court. At any time after the probation period but within the maximum period 145
for which the defendant might originally have been sentenced, the Court may issue a warrant and cause the defendant to be arrested and brought before the Court. Thereupon the Court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."

Now, that first paragraph, your Honor, is what your order refers to, and substantially follows this language: "The court may thereupon discharge the probationer," which is what your order says it does. 146

The Court: Yes.

Mr. Browne: And "from further supervision." That is what your order says it does.

The Court: Yes.

Mr. Browne: "And may terminate the proceedings against him," which is just what your order says it does. That is all your Honor has done.

As to the legal effect of that, insofar as it definitely terminates the proceeding is concerned, the cases that I rely upon hold that when the courts take into consideration the history and the purpose and object of the Probation Act and the 147
theory of giving the probationer a chance to rehabilitate himself, that when he complies with the order of probation or is relieved therefrom, that thereupon he becomes absolutely immune from any further proceedings in the cause or, as one case which I have here puts it, "When the period of probation ends favorably there remains nothing of the procedure, not even the record of the offense committed," and as they say in another case, "This

148 statute combines the American System of probation with the European System of conditional sentence by using either form of disposition of the defendant and admitting the defendant to probation under either, resulting in each case, if the defendant proves himself worthy, in the final discharge of the prisoner without sentence or judgment."

That is our contention.

The Circuit Court of Appeals in another case says that if the probationer complies with the condition of his probation, he is entitled to a final discharge.

149 We say that when he complied with this order of probation made by your Honor and when you relieved him from further supervision thereunder and terminated this proceeding under the construction of the Probation Act, not necessarily as the language of your order reads, I mean, or what you intended to have done, we say the legal effect which follows that, as no courts have held yet, is to definitely terminate those proceedings just the same as if they had no longer existed, that the power and jurisdiction to further participate in them is at an end.

150 The Court: This was a separate indictment?

Mr. Karasik: Separate indictments, three separate indictments.

Mr. Browne: And three separate dispositions.

The Court: So that the recent decision of the Circuit Court of Appeals applies to only two counts in an indictment?

Mr. Karasik: That is exactly what I was going to point out, three separate indictments, and I also want to state at this time, if your Honor please, that the order of December 16th that your Honor signed relieving him from reporting was not signed by your Honor until after the probation officer in New

York was given notice and furthermore until after the probation officer in the Eastern District was 151
called in by your Honor and the entire matter discussed and the entire effect taken into consideration. In other words, this was not an order signed on the spur of the moment or handed in ex parte. *Your Honor first made me* report to the probation officer, Mr. Princeline in the Eastern District. Mr. Princeline then submitted a report to your Honor and then your Honor communicated and consented to listen to argument and I served notice on the probation officer in New York and we had argument in your chambers on that.

There are three separate and distinct indict- 152
ments. Your Honor imposed sentence of two years and a fine of $1000 on one indictment. The sentence was imposed, the fine was paid. The other two indictments your Honor suspended sentence. It differs from the case relied on, because in that case that they rely on it was different counts in one indictment. There are three separate indictments.

Mr. Browne: Your Honor, when this petition for writ of habeas corpus was drawn—I should like your Honor to glance at it for a moment and you will see that it was drawn with considerable and 153
distinct circumspection and with the Greenhouse case definitely in mind, distinguishing this case from the Greenhouse case where the court said that the sentencing court could not split up a sentence by imposing a term of imprisonment in regard to some counts and suspending sentence with regard to others, that there was only one element of conviction and it could not be divided into component parts.

As your Honor will observe from the allegations of this petition for the writ, we set forth that these were *three separate and distinct* indictments upon

which three separate and independent pleas were
154 entered and upon which three separate and independent sentences were made by the court. It is just the same as though it was an independent proceeding.

The Court: What strikes me is that if Mr. Frad was guilty of a crime, why didn't they prosecute him directly for that crime? Why should he be lugged in under this provision?

Mr. Browne: Well, your Honor, here is the situation—

Mr. Shears: May I answer that? I believe it is directed to the Government.

155 The Court: Yes.

Mr. Shears: Because the question is more or less of a governmental action.

The Court: Yes.

Mr. Shears: That may, of course, be an alternative of the Government. However, it is customary under these violations of the law that if a man is out on probation—and the Government contends that a man's probation never expires regardless of your Honor's order until the maximum term of sentence under which he could have been sentenced expires. Now, the Government in this case
156 is proceeding under probation violation through the probation officer's office, inasmuch as that is the prescribed method by which a probationer is returned for sentence in case he violates the terms of his probation. Now—

The Court: Well, Mr. Shears, what has been done by my order except to end the probation proceeding?

Mr. Shears: That is the reason for this particular hearing this morning.

The Court: I say what has been done by this order except that? 157

Mr. Shears: Counsel, you see, for defendant here are attempting to carry water on both shoulders. They are trying to contend before your Honor that —in fact Mr. Browne's contention is just what the Government wishes to have decided this morning, but in a writ of habeas corpus served on me on December 4th he said the following, showing they are carrying water on the other shoulder when they proceed in another court.

The Court: Yes.

Mr. Shears: Paragraph 9 of that writ: "That on or about the said 8th day of November, 1936, the 158 said order admitting the relator to probation as aforementioned, and to which the said order of November 20, 1936 refers (and, as well, the warrant issued thereupon for the apprehension and arrest of the relator)"—that, your Honor is the warrant of the probation officer asking that he be sentenced under the Probation Law—"was no longer in force and effect and is no longer in force and effect and that since said 16th day of December, 1935, relator had not been subject thereto or answerable thereunder, and that since said date said separate causes and 159 separate indictments designated C-80-944 and C-96-120 have been and are fully terminated and at an end."

There is the other side of the case. Now, if that is their position now, what I want to know from your Honor is was that your intention when you signed that order? That is the only issue in this case.

The Court: That is all I did, Mr. Shears. I don't see that I did anything here except what we in-

tended to do, that is to terminate the supervision—
160 probationary supervision of this man Frad under the original order, but it left the indictment, the plea, the nature of the crime, the time in which he could be sentenced, limit, all of that is left out.

Mr. Shears: That is correct.

The Court: And if the law is that he can be arrested at any time during that period and there is no obstacle in the way of a probation order which might impose different terms, then there is nothing to prevent, there is nothing in this order to prevent you from proceeding. That is my view. I haven't thought that where a man is charged with
161 a crime and the probation supervision has ceased, that it would be probable—unless connected up with the previous crime in some way, as a direct result or something of that sort, or he had misled the Court and had violated the probation order before the release came—why the best way is to charge him with the crime and try him on the crime.

Mr. Karasik: Exactly.

The Court: But that is only my idea. Here there was no question but that the crime that he is now
162 arrested for was not committed while the probation order was in existence. That is right, isn't it?

Mr. Browne: That is correct, your Honor.

The Court: And I do not see any reason to change the order I made, provided it is interpreted as I interpret it, and that is that it follows the statute and that the probationary supervision over this defendant ceased.

Mr. Shears: In that case, your Honor, I suggest that this order, then, be resettled to strike out the

words "terminating the proceedings in this cause," because that might be interpreted by a higher court—

The Court: That is what the statute says, doesn't it?

Mr. Browne: That is what the statute says, and I certainly object to any modification of any order that would be contrary to the provisions of the statute. That is the language of the statute.

The Court: There is no probation proceeding before me, that is the way I look at it.

Mr. Browne: That is my contention.

The Court: This man Frad is not on probation with either the probation officer of the Southern District or the Eastern District or in California.

Mr. Shears: Well, he is on probation but he is not reporting to any probation officer.

The Court: He is not on probation before the Court to report to any of these various officers.

Mr. Shears: He is not reporting. He is, however, under the law on probation.

Mr. Browne: That is the question.

The Court: Now, that is a question.

Mr. Shears: That is right.

The Court: He is apparently on probation until he is sentenced or the limit of time has expired in which he could have been sentenced.

Mr. Shears: That is correct.

The Court: And isn't that right?

Mr. Shears: That is a correct statement of law, your Honor.

Mr. Browne: I can go further than that.

The Court: Yes. Then, if that is so, all I can say, I certainly have no authority to shorten that legislation.

Mr. Shears: That is right.

166 The Court: I have no right and no intention to say Congress has said so and so, but I say by an order so and so. That order would be of no avail whatever.

Mr. Shears: That is correct.

Now, there is one more point, your Honor.

The Court: But I did have a right to end the probation.

Mr. Shears: Probation?

The Court: If he were—

Mr. Shears: To end probation supervision.

167 The Court: Yes. Now, that is as much as I intended to do, and that is all I think I have done. I think that if you try to read those words, "proceedings against him in this cause be and the same hereby are terminated" it means nothing, there is no proceeding against him.

Mr. Shears: That, of course, is the Government's contention. However, I have just read you from petitioner's brief on a writ of habeas corpus which takes the opposite position.

The Court: Well, I don't think that is sound at all.

168 Mr. Shears: No, neither do I.

Mr. Browne: I do not take that position.

Mr. Shears: Now let me ask you one question which will resolve this entirely, your Honor. It was not your Honor's intention on December 16, 1935, to in any way sentence this man under the original indictment?

The Court: Not the slightest.

Mr. Shears: That is all I wish to know, your Honor.

The Court: Not the slightest bit. There was no reason for me sentencing him, Mr. Shears; there 169
was no reason for my sentencing him.

Mr. Shears: Not at all; that was the position—

The Court: We intended, as Mr. Karasik and his counsel were arguing, that he be relieved of this annoying supervision which can never do anything to rehabilitate him, he was a man of years, he has served his full term, he had paid his fine, and to have him bother the probation officer of the Southern District with failure to answer letters and things of that kind, it was simply a waste of time, and so in my opinion it should end. Now, that is all. I relieved him of that string, that supervision, 170
but to say that I attempted to amend the law which says that he still remains subject to apprehension during the period of time that he might have been sentenced by me regardless of this attempting to rehabilitate, which is in the form of a probation supervision, why, is another thing. That is not so.

Mr. Shears: The one further step that you did have at that time, the right to sentence, if you wished, but you did not at that time intend to sentence this man.

The Court: If for instance, I imagine, I had said, "I sentence you to two years and suspend the 171
imposition of sentence" and then had entered an order such as I did enter, I would have had to impose that sentence or change that sentence in some way.

Mr. Shears: Yes, you would, which would have been void, of course.

The Court: Certainly.

Mr. Shears: You had no right to do it.

The Court: Yes, I had no right to do it. I did

not impose sentence on this man on these two
172 counts, thinking that he had suffered enough if he had served his two years, at his age, on the first indictment, especially where he has pleaded guilty and thrown himself on the mercy of the Court.

Mr. Shears: Yes, that is right.

The Court: Now, that being done he walks out, he serves his term, comes back still subject with his plea of guilty, on two indictments.

Mr. Shears: That is right.

The Court: No sentence has been imposed.

Mr. Shears: That is right.

The Court: And he is constantly interfered with
173 in that sense, and the Government is put to unnecessary trouble in that sentence by a probation order, which requires supervision.

Mr. Shears: Yes, sir.

The Court: Now I cancel that, send him out into the world freed of that supervisory order, he is still subject to the law, and whatever that law is I did not change except I could sentence him, I could bring him back and sentence him.

Mr. Shears: Yes, you could do that, you have that power.

174 The Court: Yes.

Mr. Shears: Provided, of course, you were sitting in the Southern District of New York.

The Court: Yes, if I were sitting in the proper jurisdiction. I would have to issue a warrant.

Mr. Shears: That is right.

The Court: And he would be apprehended. Still, if he had violated my probation order, I would not even have to issue a warrant.

Mr. Shears: That is right.

The Court: The probation officer could arrest him and bring him before me. 175

Mr. Shears: Yes, that is the correct statement, as I see it.

Mr. Browne: Your Honor, I do not agree with my adversary in his construction and interpretation of the law.

The Court: That is on the habeas corpus?

Mr. Browne: Yes.

The Court: I am not going to argue that now before me, if you are going to argue it before Judge Bondy.

Mr. Browne: Yes, that is right. And at this time I must disagree with your Honor's offhand impression as to the effect of that release from probation. 176 We are not carrying water on both shoulders. We allege the fact to be in our petition that your Honor discharged this probation order and discharged him from the obligation thereunder, and it is our further contention that the legal effect of that decision is a question of law that will be raised in the habeas corpus proceeding and is not involved here.

The Court: Well, I will tell you—

Mr. Browne: And I would like to offer a suggestion to your Honor. 177

The Court: If this order read this way, "and the defendant is discharged from further supervision and the probation orders existing against him in this cause be and the same hereby are terminated,"—

Mr. Shears: That would be correct.

The Court: I think that is correct.

Mr. Shears: I think that is correct disposition, your Honor, and I so move.

178 Mr. Karasik: Just a minute, if your Honor please, I want to say a few words, because this order, as I stated before, if your Honor please, was obtained in an orderly manner.

The Court: Right; but that is all I was doing, Mr. Karasik.

Mr. Karasik: But your Honor has gone to a great deal of pains, got a report, this man is a sick man, there is no charge made that the order was obtained by any misrepresentation, as a matter of fact there is nothing here to show that he has done anything to violate the probation if such a probation had been in force.

179 The Court: I understand that.

Mr. Karasik: There is a charge made against him. Why not try him on that charge? Why not wait until that second charge is disposed of before you start resort to this violation of probation?

The Court: No, I will tell you what I think. I would not think that you could argue very well differently from what we have contended here, the Government and myself, but of course counsel hang their hats on any hook they can find, but I don't want any mistake to be made here. I will

180 tell you what I think clears it right up, and I think it is absolute—"that the defendant is discharged from further supervision and the probationary proceedings against him in this cause be and the same hereby are terminated." I think that is absolutely all that was intended and is exactly correct.

Mr. Browne: I don't want to argue the question with your Honor, and I don't want the impression to gain ground that we are trying to be technical, Judge—

The Court: Well, I will resettle the order with that amendment, that is the word "probationary" 181
to precede the word "proceedings."

Mr. Browne: Well, your Honor, I think that might tend to invalidate our habeas corpus proceeding. I think, your Honor, we don't question it, there is no necessity for resettling the order, I don't question but that your Honor intended to terminate the probation proceedings.

The Court: Well, that is all. That is all I did do.

Mr. Browne: Well, we don't dispute that.

The Court: Well, that is the trouble. Mr. Shears says you put in a clause there which would mean even the proceeding under the statute. 182

Mr. Browne: No, I didn't say that at all. What I meant, what I am alleging is that the effect of terminating this probation proceeding where there was no imposition of sentence, under the cases that I rely upon, the effect of that is—the legal effect is to definitely terminate the cause, not your Honor's order. I say that is the legal effect. I am pleading the legal effect of the termination of the probation order.

The Court: Well, of course, the other thing is not obvious, it is a matter for you to argue, but that does not affect the matter before me. I want 183
to clear my order up, or any dispute at all. What Mr. Princeline and myself were concerned with was the probationary proceeding which I had instituted by an order, and I intended to give Mr. Karasik, counsel for Mr. Frad, the advantage of having his client free on the probationary supervision, let him go out.

Mr. Browne: Well then, your Honor, can't we dispose of that by having the proceedings here this

morning made part of the earlier record? I will
184 consent to that.

The Court: I don't care how you do it, although I have to eliminate any argument by counsel through different channels. Of course you could not very well and you should not argue differently, but to eliminate it so that there will be no interpretation falsely, I will resettle this order to add the word "probationary" before the word "proceeding," and that covers everything in connection with the probation order that I intended to do or that you may claim. I have nothing to do with the effect. You can argue that. Suppose I had not put him on
185 probation and had just suspended sentence, which would be illegal, and then he were arrested and the Government said, Why, he is liable to be arrested, for ten years, at any time,—you can argue that regardless of my order, there is no question about that.

Mr. Browne: Now, your Honor, before you resettle the order, I have no objection to that resettlement if it will not tend in any way to jeopardize our habeas corpus proceeding. I would like an opportunity to look at the law on that and see
186 whether it will.

The Court: I don't want to jeopardize your proceeding, because you are raising an entirely different question.

Mr. Browne: That is it.

The Court: I don't see how it could jeopardize it.

Mr. Browne: Well, I don't say it will, but I don't want to take any chance. I think our position is right. As I say, your Honor, it is a virgin question which must ultimately go to the Supreme Court of the United States. It is a matter of importance to

the Government and it is a matter of importance to probationers. 187

The Court: Well, I will do this, then, Mr. Browne. I will say this, that I think that we all agree, even yourself, that the word "probation" or "probationary" before the word "proceeding" does no more than to make very clear the intention of the Court at the time. I am perfectly willing to resettle the order so that the word goes in as indicated, in order to avoid any complication in regard to the form of the order, which otherwise would be far beyond the jurisdiction of this Court. Now, if the United States Attorney, with that statement on the record and with this discussion, wants to wait before he presents an order to resettle until you have had your argument, with the understanding that if inadvertently you commence to argue the other way, that Inch, *J.* has taken away the authority to do anything under the indictment, why then he can show this record— 188

Mr. Browne: Oh, yes.

Mr. Shears: That is exactly what I was going to urge.

Mr. Browne: I am not going to argue that at all.

The Court: But if Judge Bondy grants the writ, then, of course, we can resettle the order anyhow, as a matter of record, for further appeal. 189

Mr. Shears: Yes. The Government is willing to adjourn the resettlement.

The Court: That is all.

Mr. Shears: Under the condition, of course, that you will resettle on the basis of this argument this morning, in accordance with the record.

The Court: Oh, yes.

Mr. Karasik: Also subject to a brief and memo-
190 randum which I want to submit, your Honor. Your Honor, you want to look into the matter further—

The Court: No, I am afraid I can't come over again. I like to be over here, but I have heard this argument and I have made my decision, and my decision is to resettle this order so as to insert the word "probationary" in front of "proceedings," because that accomplishes just what I had in mind. When you will present the order is a matter for the discretion of the United States Attorney.

Mr. Karasik: May I offer a suggestion?

The Court: Yes.

191 Mr. Karasik: And I think it will be agreeable to the United States Attorney. You are very familiar with this proceeding, and I should think myself, and I believe that Judge Bondy would be agreeable, that your Honor being so familiar with the history of this case, that we argue before you and have consideration of my contentions in the habeas corpus proceeding. I would like your Honor, if you will, to hear argument, and I am sure Mr. Shears would have no objection.

The Court: Well, thank you, but I am not des-
192 ignated here at all. I haven't any authority to sit in this district except I have got a right to come over here and resettle an order, but I haven't any right to come over here and hear a writ of habeas corpus that is not dependent upon my order at all, it is aside from that. The only argument that you could make in which my order would appear would be that the law is as follows, but that Judge Inch by an order of probation has modified it in some way. Then you could argue my interference as being necessary. But where you say it doesn't make

any difference what Inch, *J.* decided, there is no probation but the law says that this man can be 193
arrested any time within the limit of the sentence that could have been imposed by Judge Inch, why, you are arguing something that any Judge over in this district can decide without me. I am much obliged. I always enjoy Mr. Browne, we have had quite some interesting cases together and we were right all the time, although we didn't quite come to the—

Mr. Karasik: The fact remains the defendant was arrested without any warrant or right.

The Court: I don't know anything about that.

Mr. Shears: That is not so, your Honor. 194

Mr. Browne: He was arrested under a probation warrant.

The Court: Resettle order and put the word "probationary" before the word "proceeding" and resettle.

Mr. Browne: Will your Honor hold up the entering of the order?

Mr. Shears: I have agreed to that.

Mr. Browne: You have agreed to that?

Mr. Shears: Yes, until such time as we find it necessary.

195

Petition for Writ of Habeas Corpus

196 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD,

Relator,

—*against*—

JOHN J. KELLY, United States Marshal for the Southern District of New York, or any other
197 person having charge, custody or control of the body of the above named relator William Frad,

Respondent.

To the Honorable Francis G. Caffey, United States District Judge for the Southern District of New York:

The petition of Ella Frad respectfully shows and alleges:

198

1. That she is the wife of William Frad, the relator above named.

2. That the relator herein was indicted by the Grand Jury for the Southern District of New York upon three separate indictments; that the indictment designated C-96-116, charged the relator with violating Title 18, Section 88, United States Code; that the indictment designated C-80-944, charged the relator with violating Title 22, Sections 220 and

221, United States Code and Title 28, Section 102, United States Code; that the indictment designated C-96-120 charged the relator with violating Title 8, Section 2[illegible]3, United States Code and Section 22, subdivision b, of the Immigration Act of 1922. 199

3. That on or about the 26th day of March, 1934, the relator entered a separate plea of guilty to each of said separate indictments.

4. That the United States District Court for the Southern District of New York (Honorable Robert A. Inch, District Judge, presiding) thereupon imposed upon the relator a separate sentence upon each said separate indictment, as follows: 200

Upon indictment designated C-96-116 relator was sentenced to two years imprisonment and in addition thereto to pay a fine in the sum of One Thousand Dollars.

Upon indictment designated C-80-944, imposition of sentence was suspended, and pursuant to the Act of Congress in such case made and provided, relator was ordered and was placed on probation for a period of four years to begin after relator served the said separate sentence imposed upon him under said separate indictment designated C-96-116. 201

Upon indictment designated C-96-120, imposition of sentence was suspended, and pursuant to the Act of Congress in such case made and provided, relator was ordered and was placed on probation for a period of four years to begin after relator served the said separate sentence imposed upon him under said separate indictment designated C-96-116.

202 5. That relator was imprisoned upon said separate sentence under said separate indictment designated C-96-116 in the penitentiary known as United States Northeastern Penitentiary at Lewisburg, Penna., pursuant to and in accordance with the said separate sentence and was there imprisoned and confined until duly discharged according to law. That relator also paid the said fine of One Thousand Dollars.

203 6. That by an order duly made by said United States District Court for the Southern District of New York (by the Honorable Robert A. Inch, District Judge) on the 16th day of December, 1935, the aforementioned order of probation made on the said 26th day of March, 1934 was duly revoked and the relator duly discharged therefrom and duly discharged from further supervision thereunder and by said mentioned order the proceedings against him in said causes and under said separate indictments designated C-80-944 and C-96-120 were duly and finally terminated.

204 7. That on or about the 20th day of November, 1936, a purported order was made by the United States District Court for the Southern District of New York, by the Honorable Francis G. Caffey, United States District Judge, that a warrant issue for the apprehension and arrest of the relator and that a warrant was thereupon issued for the apprehension and arrest of the relator and that pursuant thereto and by virtue thereof the relator was apprehended and arrested and is now in actual custody thereunder and detained by John J. Kelly, the United States Marshal for the Southern Dis-

trict of New York, and is now actually imprisoned and detained and restrained and deprived of his liberty. 205

8. That the said mentioned order of November 20, 1936, and the said mentioned warrant issued thereupon are predicated upon the allegation, charge, claim or pretense that the relator on or about the 8th day of November, 1936 committed an act which constituted a violation of one of the terms of the aforementioned order admitting the relator to probation and that the relator should be resentenced upon the said separate indictments designated C-80-944 and C-96-120. 206

9. That on or about the said 8th day of November, 1936, the said order admitting the relator to probation as aforementioned, and to which the said order of November 20, 1936 refers (and, as well, the warrant issued thereupon for the apprehension and arrest of the relator), was no longer in force and effect and is no longer in force and effect and that since said 16th day of December, 1935, relator had not been subject thereto or answerable thereunder, and that since said date said separate causes and separate indictments designated C-80-944 and C-96-120 have been and are fully terminated and at an end. 207

10. That the said order of November 20, 1936, directing that a warrant issue for the apprehension and arrest of the relator for alleged violation by him of said mentioned order admitting him to probation and the warrant issued thereupon and upon which the relator was apprehended and arrested

and is now detained in custody and imprisoned and
208 restrained and deprived of his liberty, as aforesaid, were and are utterly and wholly illegal, invalid, null and void, and have been so at all times, and that there was and is no jurisdiction in said court or in any Judge or officer thereof, to make or issue the same, and that the said United States District Court for the Southern District of New York is without power or jurisdiction to resentence the relator upon said separate indictments designated C-80-944 and C-96-120, and that no Judge of said *United States* District Court has power or juris-
209 diction to resentence the relator upon said designated separate indictments and that said court and any Judge thereof is without power or jurisdiction to further act in said separate causes and upon said separate indictments designated C-80-944 and C-96-120 against the said named relator William Frad.

11. That the relator is now detained, confined, imprisoned, and restrained of his liberty in violation of law and in contravention of the Constitution of the United States and the Amendments thereto and without due process of law, and that he has not been committed and is not detained by virtue of a
210 mandate or other process or the final judgment or decree of a competent tribunal or court or Judge of civil or criminal jurisdiction or the legal or valid final order of such a tribunal, court or judge made in a special proceeding instituted for any cause, nor for any act constituting a contempt of court, nor by virtue of any legal or valid execution or other process issued upon such judgment, decree or final order by any tribunal, court or judge having jurisdiction.

WHEREFORE your petitioner prays that a writ of habeas corpus issue herein directing the respondent or any other person having charge, custody or control of the body of the above named relator, to forthwith have the body of the relator William Frad, together with the time and cause of his detention, imprisonment and restraint, by whatsoever name he shall be known, called or charged, before this court, or a Judge thereof, and forthwith show cause why said relator should not go forthwith discharged from such custody, detention, restraint and imprisonment, and to do and receive what is then and shall be considered concerning him. 211

That no previous application has been made. 212

Dated, New York, December 4, 1936.

ELLA FRAD,
Petitioner.

LOUIS KARASIK and HARRIS JAY GRISTON,
Attorneys for Relator,
Office & Post Office Address,
No. 50 East 42nd Street,
Borough of Manhattan,
City of New York. 213

State of New York,
214 County of New York, ss.:

ELLA FRAD, being duly sworn, deposes and says that she is the petitioner herein; that she has read the foregoing petition and knows the contents thereof; that the same is true of her own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

ELLA FRAD.

215 Sworn to before me this
4th day of December, 1936.

JOHN J. OLEAR, JR.,
Notary Public, N. Y. County.

216

Writ of Habeas Corpus

HIS EXCELLENCY, FRANKLIN D. ROOSEVELT, President of the United States of America, 217

THE UNITED STATES OF AMERICA,

To John J. Kelly, United States Marshal for the Southern District of New York, *or any other* person having charge, custody or control of the body of William Frad,

GREETING:

WE COMMAND YOU, that you have the body of WILLIAM FRAD, by you imprisoned and detained as it is said, together with the time and cause of such detention, imprisonment and restraint, by 218 whatsoever name he shall be known, called or charged, before this Court at Room 318, in the United States Court House Building, Foley Square and Centre Street, Borough of Manhattan, City of New York, at 2 P. M. this day to do and receive what shall then and there be considered concerning him, and show cause forthwith why he, the said WILLIAM FRAD, should not be forthwith discharged from such custody, detention, restraint and imprisonment, and have you then and there this Writ.

WITNESS, Honorable John C. Knox, United 219 States District Judge, in the Southern District of New York, this 4 day of December, 1936.

CHARLES WEISER,
Clerk of the United States
District Court for the
Southern District of New York.

(SEAL)

LOUIS KARASIK and
HARRIS JAY GRISTON,
Attorneys for Relator,
50 East 42nd Street,
New York City,

220 The foregoing Writ of Habeas Corpus is hereby allowed.

FRANCIS G. CAFFEY,
U. S. D. J.

Dated, New York City, December 4, 1936.

Return to Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

221 SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, *—against—* HONORABLE JOHN J. KELLY, United States Marshal for the Southern District of New York.	C-80-944 C-96-120

222 NOW, to this Honorable Court comes John J. Kelly, United States Marshal for the Southern District of New York, and produces in open court the body and person of William D. Frad alias Edward Swift, alias Fred Warren Gorham, in obedience to the writ of habeas corpus issued out of this court, requiring that the respondent have in court on the 11th day of December, 1936, at 4:30 o'clock in the afternoon before the Honorable William Bondy, United States District Judge, in Room 318

of the United States Courthouse, in the Borough of Manhattan, City, County and State of New York, to do and receive what shall then and there be considered concerning the said William D. Frad. 223

As and for a return to the said writ of habeas corpus respondent alleges and respectfully shows this Honorable Court as follows:

State of New York,
County of New York,
Southern District of New York, *ss.*: 224

JOHN J. KELLY being duly sworn, deposes and says that he is the United States Marshal for the Southern District of New York and upon information and belief alleges as follows:

(1) The respondent admits the allegations of fact contained in Paragraphs 1, 2, 3, 4, 5, 7 and 8 of the petition in support of the writ of habeas corpus and denies each and every allegation contained in Paragraphs 6, 9, 10 and 11 thereof.

225

(2) That the petitioner has been properly committed to the custody of the respondent by virtue of a warrant issued by the Honorable Francis G. Caffey, dated the 20th day of November, 1936.

(3) That petitioner was thereupon duly arraigned before the Honorable Henry W. Goddard, United States District Judge, who enlarged the petitioner on bail in the sum of $5,000.

(4) That on December 4, 1936 the petitioner was
226 surrendered to the custody of the respondent.

(5) That on December 4, 1936, the Honorable Francis G. Caffey issued a writ of habeas corpus returnable the same day, in Room 318, U. S. Courthouse.

(6) That petitioner was duly arraigned before the Honorable William Bondy who enlarged the said petitioner on bail in the sum of $5,000.

The sources of deponent's information and the
227 grounds of his belief as to the facts hereinbefore alleged are a certified copy of the docket of the United States District Court, a certified copy of the petition for revocation of probation of E. Fred Sweet, Probation Officer for the Southern District of New York, and a certified copy of an order for issuance of a warrant to apprehend the probationer signed by Judge Caffey dated November 20, 1936, and conversations had with the United States Attorney or his representatives, as well as records kept in respondent's office.

228 WHEREFORE, deponent prays that the writ of habeas corpus may be dismissed.

JOHN J. KELLY.

Sworn to before me this
8th day of December, 1936.

LEO LOWENTHAL
Leo Lowenthal, Notary Public,
New York County, Reg. No. 429,
Commission expires March 30, 1937.

Traverse to Return

UNITED STATES DISTRICT COURT 229

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD, Relator, —*against*— JOHN J. KELLY, United States Marshal for the Southern District of New York, or any other person having charge, custody or control of the body of the above named relator William Frad, Respondent.	M-17-396 230

WILLIAM FRAD, the relator herein, for this, his Traverse to the respondent's Return to the Writ of Habeas Corpus issued herein on the 4th day of December, 1936, by Honorable Francis G. Caffey, United States District Judge, alleges:

1. He denies the allegation therein designated (2) that the relator has been properly committed to the custody of the respondent by virtue of a warrant issued by the Honorable Francis G. Caffey, dated the 20th day of November, 1936. 231

2. He denies the allegation therein designated (3) that the relator was thereupon duly arraigned before the Honorable Henry W. Goddard, United States District Judge, and alleges that upon such arraignment he was enlarged on bail in the sum of $5000.

Traverse to Return

AS A FURTHER TRAVERSE to said respon-
232 dent's return to the said Writ of Habeas Corpus issued herein, the relator alleges:

3. That on the 8th day of December, 1936, an application was made to this court (the Honorable Robert A. Inch, District Judge, presiding) to vacate and for a construction by it of its order made on 16th day of December, 1936, referred to in the relator's petition for the Writ of Habeas Corpus issued herein and that a hearing thereon was had before the said District Court and that the said
233 District Court made its decision to the effect that it would resettle said order by indicating that its intention was to terminate the order made by it on the 26th day of March, 1934, admitting the relator to probation and to revoke the same and to discharge the relator therefrom and from further supervision thereunder, but did not pass upon or decide and declined to pass upon and decide the legal effects resulting from or following from said order or any rights or benefits flowing to relator in consequence thereof or as to the jurisdiction or power of this court or any Judge thereof to order the ap-
234 prehension or arrest of the relator herein or the effect of any warrant issued thereunder or as to the jurisdiction or power of this court or any Judge thereof to sentence the relator upon indictments designated C-80-944 and C-96-120, and referred to in the relator's petition for the writ of habeas corpus issued herein, or as to any of the contentions made by the relator in support of said petition for a writ of habeas corpus declaring that such matters and contentions were the subject of decision in this proceeding and that the said District

Court in no way passed thereon or decided the same. And in support thereof and as part hereof, relator annexes hereto the minutes of the said proceeding before the said District Court on said 8th day of December, 1936, same being marked Exhibit A. 235

WHEREFORE the relator prays that for the matters, reasons, claims and allegations made by him that the said Writ of Habeas Corpus be sustained and that the relator be discharged from custody and petitioned for.

Dated, December 10, 1936.

WILLIAM FRAD, 236
Relator.

LOUIS KARASIK,
Attorney for Relator,
50 East 42nd Street,
New York City.

United States of America,
Southern District of New York, *ss.*:

WILLIAM FRAD, being duly sworn, deposes and says, that he is the relator herein. That he has read the foregoing Traverse to the respondent's Return to the Writ of Habeas Corpus issued herein. That the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. 237

WILLIAM FRAD.

Sworn to before me this
10th day of December, 1936.

FRANCIS J. WAZETER
Notary Public, Bronx County
Certificate filed in New York County.

Hearings on December 21, 1936

238 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred W. Gorham,

Plaintiff,

vs.

HONORABLE JOHN J. KELLY, United States Marshal for the
239 Southern District of New York

Defendant.

Before:

HON. WILLIAM BONDY,
District Judge.

New York, December 21, 1936;
3 o'clock, p. m.

240 Appearances:

LAMAR HARDY, Esq.,
United States Attorney, for the Government;
By Curtis C. Shears, Esq.,
Asst. U. S. Attorney.

LOUIS KARASIK, Esq.,
and
HARRIS J. GRISTON, Esq.,
Attorneys for Relator.

Mr. Karasik: May I proceed, your Honor?

The Court: Yes. 241

Mr. Karasik: May it please your Honor, this is an argument on the return of a writ of habeas corpus. The facts briefly are as follows: in March, 1934, the defendant pleaded guilty to three separate indictments. One indictment was found in June, 1931, charging an offense committed the preceding May; the second indictment was found on February 1934, charging an offense to have committed—

The Court: Which was the first one, January?

Mr. Karasik: The first indictment was June, 1931, and the offense charged was committed in May, 1931. The second indictment was February, 1934, the offense charged being committed on June 28, 1931. 242

The Court: Is that a different crime?

Mr. Karasik: Different crimes. The third indictment was found in March, 1934, for an offense alleged to have been committed in April, 1928, and 1930.

The Court: Entirely different crimes?

Mr. Karasik: Entirely different crimes. On these three indictments, sir, the defendant pleaded guilty before Judge Inch, who was holding court in this district on the 26th day of March, 1934. Judge Inch imposed a sentence on one indictment of two years and a fine of a thousand dollars. On the remaining two indictments the decision was as follows: 243

The Court: He pleaded at the same time?

Mr. Karasik: He pleaded all at the same time. I will quote this: *"Imposition of sentence suspended, the probation for four years to begin after serving sentence on C-96-116, subject to the stand-*

ing probation order of the Court. Signed, Inch,
244 *D. J.*"

In passing let me make this statement—

The Court: Just read what the sentence was on the first indictment.

Mr. Karasik: On the first indictment—

The Court: Is it material?

Mr. Karasik: Yes, it is material. On the first indictment he was sentenced to two years imprisonment, to be confined to a place of confinement named by the United States Attorney-General, and also he was to pay a fine of a thousand dollars. On the
245 remaining two indictments, Judge Inch placed him on probation for four years. The endorsement I read before, namely, "Imposition of sentence suspended, probation of four years to begin after serving sentence on the first indictment."

In passing may I say this, if your Honor please, that on one of these indictments the statute of limitations has run against it.

The Court: *You mean at that time?*

Mr. Karasik: *At that time*, when he entered a plea of guilty.

The Court: And did you represent him then?

246 Mr. Karasik: I did not sir; I did not. Now the defendant was then confined to the Northeastern Penitentiary. He served his term, less allowance for good behavior. He paid his fine. On the 13th of December, 1935, that is after he was discharged from the penitentiary and paying his fine, I presented a petition to Judge Inch to release him from probation. I brought the facts to the judge's attention in his chambers. Judge Inch called in Mr. Printzlien, the probation officer in the Eastern District where the judge was then sitting, and after

discussing that the judge suggested that I give notice to the Probation Office in New York. I then personally served the papers on the Probation Office, and if your Honor will refer to the original papers you will find that the return day was blank, and I filled it in only when Judge Inch told me that he could hear the motion on certain days. So I came to inquire personally from the Probation Office which day would be more convenient. He selected a day and I inserted that day, and on that day, sir, we appeared. The probation officer was there; the defendant was there, and after argument Judge Inch entered an order on December 16, 1935, which in substance provides: "Ordered that the order of probation made herein on the 26th day of March, 1934—" 247 248

The Court: That was the order?

Mr. Karasik: That was the order—that was the day of sentence.

> "Ordered that the order of probation made herein on the 26th day of March, 1934, and which is in force and effect by the standing probation order of this Court be and the same is hereby revoked and the defendant is discharged from further supervision and the proceeding against him in this cause and the same are hereby terminated. Dated New York City, December 16th, signed Judge Inch." 249

I may also add in passing that this is exactly the language of Section 725 providing for that procedure, so that all Judge Inch did was to follow the law verbatim in this order.

The Court: I do not know what you are going

to drive at. You are familiar with that Greenhouse
250 decision?

Mr. Karasik: I am, sir, but I will ask your Honor's kind indulgence to present the analogy.

The Court: Yes.

Mr. Karasik: Thank you.

The Court: I only ask what the issue is.

Mr. Karasik: I will come to it in a moment, sir. In other words, the order just read by me follows the language of the statute identically. That order remained in force and effect for eleven months. No motion was made, no appeal was taken, no motion was made to modify or change it or revoke it. On
251 the 19th day of December—or the 19th day of November, rather, a complaint was made in this court.

The Court: What year?

Mr. Karasik: This year, eleven months and three days. A complaint was filed by a Mr. W. J. McNulty, who says that he is a special agent in the Federal Bureau of Investigation and he charges this defendant with larceny on the high seas. The defendant never had a hearing before the Commissioner; he was not represented by counsel before
252 the Commissioner; he waived examination and was admitted to bail. Immediately thereafter, sir, he was re-arrested on a warrant issued by Judge Caffey, predicated on an affidavit by Mr. E. Fred Sweet, the probation officer, who charges a breach of probation on the part of this defendant. The affidavit is very short. I will read it to your Honor:

> "To the Honorable Francis Caffey, Judge of the District Court of the United States for the Southern District of New York.

"The petition of E. Fred Sweet, Chief Probation Officer for the District Court of the 253
United States for the Southern District of New York, respectfully shows to this Court:

"That on March 26th, 1934, the herein named defendant was placed on probation for four years to follow a penitentiary sentence of two years on indictment 96-116, said probation sentence being for violation of the Immigration Act of 1922, that he has again returned to his criminal profession of card sharper on the high seas; that he has associated with persons of ill-repute.

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"Your petitioner's information and belief are based upon a complaint filed on November 19, 1936, by Assistant U. S. Attorney Curtis C. Shears and investigations of the Federal Bureau of Investigation.

"Your petitioner, therefore, respectfully requests that the probation of said probationer, *William Frad*, be revoked, and that a warrant issue for his arrest, and that this petition be granted."

Now to begin with, Mr. Sweet, who had personal 255
knowledge of the proceeding before Judge Inch on last December, made no mention of this fact that *an order was entered by the judge* who sentenced this man, relieving him from the probation or revoking the probation. *No mention* of that was made at all. Now he was admitted to bail on that so-called breach of probation and then we surrendered him *and we sued out this writ of habeas corpus.*

There is another very significant fact, your Honor. The District Attorney in the meanwhile served

on December 2, a notice of motion. I will read it. It is important:

> "Please take notice that upon the annexed affidavit of Curtis Charles Shears, Assistant United States Attorney, verified on the first day of December, 1936, and upon all the proceedings heretofore had in this action, the undersigned will move this Court in Room 318 of the United States Courthouse, Foley Square, New York, on the 8th day of December, 1936, at 10.30 in the forenoon or as soon thereafter as counsel can be heard to set aside an order entered in this cause on the 16th day of December, 1935, signed by Honorable Robert A. Inch, United States Judge for the Eastern District of New York and for such other and further and different relief as to the Court may seem just and proper."

This motion came on regularly, sir, before your Honor on the 8th and referred to Judge Inch. We had a hearing on that motion. Testimony was taken, and in my traverse to the writ of habeas corpus I annexed and made part of it as Exhibit A the testimony taken. Now you will read it. However, I just want to call your attention to a few of Judge Inch's remarks that he made, on page 13:

> "The Court: What strikes me is that if Mr. Frad was guilty of a crime, why didn't they prosecute him directly for that crime? Why should he be lugged in under this provision?"

Have you got that, Mr. Shears?

Mr. Shears: Yes.

Mr. Karasik: Again, on page 16, it says: 259

> "Why, the best way is to charge him with the crime and try him on the crime."

He was referring to this new charge that was made against him. And again, on page 17, the paragraph before the last, Judge Inch said:

> "The Court: This man Frad is not on probation with either the probation officer of the Southern District or the Eastern District or in California." 260

Now sir, it is our contention that the order of Judge Inch of December 16, 1935, relieved the man of probation; that he was no longer on probation. Consequently he could not have been arrested for breach of probation.

The Court: That is your case?

Mr. Karasik: That is our case, sir.

The Court: Just one minute. If I read the Greenhouse case properly, then I believe the Circuit Court has held—and the United States Supreme Court has denied a certiorari. 261

Mr. Karasik: Yes.

The Court: So that under the law in that case I take that to mean this: that if a judge imposes a prison sentence and subsequently imposes a further sentence on other counts and on the other counts suspends execution of the sentence, the suspension is non-effective and the term must be served, the full term, unless a pardon is procured.

Mr. Karasik: In that case, if your Honor please—

The Court: Now you distinguish that case.

262 Mr. Karasik: Judge Inch distinguished the case—

The Court: In other words, as I understand the effect of the original sentence in this case, he was sentenced to one year in jail on the first one—

Mr. Karasik: Two years.

The Court: How many were there?

Mr. Karasik: There were three separate indictments, if your Honor please. The Greenhaus case is one indictment with several counts.

The Court: That is the way you distinguish it.

263 Mr. Karasik: That is exactly the position that Judge Inch took at the hearing. The Greenhaus case was one indictment with several counts, and the Courts held that you cannot send a man to prison on one count and then put him on probation on the others. Here are three separate indictments.

The Court: I think I decided that, didn't I? Didn't I decide that in a case recently, the Sewell case?

Mr. Shears: Yes. Judge Inch did not pass on this question; he did not have this question before him.

The Court: I had the Sewell case recently, didn't

264 I?

Mr. Shears: Yes, I think Mr. Rogers had it. I will refer to it presently.

The Court: Well that is your distinction?

Mr. Karasik: That is correct; that is the distinction that I make, three different crimes committed at different times.

The Court: On one indictment he served a jail sentence?

Mr. Karasik: He served.

The Court: And on the other indictment?

Mr. Karasik: He could be placed on probation. 265

The Court: He could be punished without reference to the other punishment.

Mr. Karasik: That is correct. And if your Honor please, please bear in mind that this is a remedial statute.

The Court: *I cannot go behind* that.

Mr. Karasik: I know, but that statute must be liberally construed.

The Court: I have posed and expressed it to every one of the Circuit Court judges that that would be reversed by the United States Supreme Court; however, the United States Supreme Court has not 266 taken jurisdiction.

Mr. Karasik: The point, however, that I want to bring before your Honor as forcibly as I can is that there cannot be any breach of probation when there is no order of probation outstanding. Whatever order there was the Court revoked it.

The Court: Assuming now that you are arguing as to one indictment of three counts.

Mr. Karasik: Yes.

The Court: Then on the subsequent counts the punishment would mean a jail sentence. The sus- 267 pension of execution is what the Circuit Court says is not good; the rest of it stands, but the execution of it does not. The suspension of execution does not stand, therefore if there were one indictment of three counts the way I read it is that there be a prison sentence on the others; for how long a term?

Mr. Karasik: For four years.

The Court: For five years in all.

Mr. Karasik: No.

The Court: How much was the first count?

268 Mr. Karasik: Two years.

The Court: Six years in all.

Mr. Karasik: He served two years on the first one.

The Court: This is on one indictment with three counts. Then according to the Circuit Court judges he would have to go to jail for six years.

Mr. Karasik: Correct.

The Court: And everything counts but the execution of sentence, that is the way I understand the decision.

269 Mr. Karasik: But, if your Honor please, he was not sentenced. There is another distinction there; just the same as in the Greenhaus case, there was a sentence imposed on all the other counts. Here, however, there was no sentence.

The Court; Read that again.

Mr. Karasik: I will read it to your Honor:

> "Upon the remaining two indictments Judge Inch placed him on probation for four years."

He did not suspend sentence; then he put him on

270 probation; he placed him on a period of probation. I will read it again: "Imposition of sentence suspended, the probation of four years to begin after serving sentence on C-96-116 under the standing probation order of this Court."

The Court: That is a peculiar sentence. He should be sentenced—

Mr. Karasik: Yes. I want to say this to your Honor, I am not disclosing any confidence, because Judge Inch expressed himself off the effect—it is

a matter of record, and Judge Inch felt that the sentence on a plea of guilty was pretty stiff, as he said, with two years. 271

The Court: Your best point, I think, is the last point; that he was not sentenced.

Mr. Karasik: No, he was not. I also want to call your attention to the fact that Judge Caffey, in the warrant, said as follows:

"It appearing to the said Court that on March 26, 1934, this court suspended sentence on the abovenamed defendant and placed him on probation pursuant to the Act of March 4, 1925, and that the abovenamed defendant has violated one of the terms of his probation: that is, he has committed larceny by trick on the high seas," etc. I say there was nothing to violate. There was no order at that time outstanding. 272

The Court: I do not think there was any suspension of execution that Judge Caffey states. However, I will hear your adversary as to that.

Mr. Shears: Your Honor is familiar with most of these cases.

The Court: I understand. It was well presented. I see the point. 273

Mr. Karasik: Thank you very much.

Mr. Shears: Your Honor has heard many of these cases, and you are quite familiar with the Greenhaus case, so I need not go into that. All I will say in approaching this subject is that this case raises squarely the Greenhaus issue. Regardless of the fact that in this case the imposition of sentence was suspended and there was no suspended sentence, the imposition was suspended and he was placed on

probation for a future term of four years, after
274 the completion of sentence.

The Court: I do not know whether that is a contradiction in terms. You must sentence and then place on probation? Can you place on probation without sentencing? Do you follow me?

Mr. Shears: Yes, I follow you.

The Court: Here you have a technical question of law.

Mr. Shears: You can sustain the imposition of sentence or you may suspend the execution.

The Court: You may suspend the imposition of
275 sentence during good behavior.

Mr. Shears: That is right.

The Court: That would not be probation.

Mr. Shears: That is correct.

The Court: It seems to me—I am not sure—it is similar to this case; you cannot have a parole until after sentence. What does the statute say? Can you point that out, about the sentence?

Mr. Griston: Yes; *it is exactly what* you may do.

The Court: Have you got the statute?

Mr. Shears: I know; in 725 under Title 18, your
276 Honor, it is absolutely essential.

A Voice: I will read it: "The Courts of the United States having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the courts that the ends of justice and the best interests of the public as well as the defendant will be served thereby, shall have power to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," and the remainder of the statute is immaterial at the present time.

Mr. Shears: As your Honor will note from that statute, it is immaterial whether the judge has 277
made the suspension of the sentence or the suspension during the probationary period. According to that statute it must follow suspension. Now going over the facts, I do not agree with my adversary. There are three indictments in this case. This case went to trial on the 21st day of March, 1934. At that time the Government, supported by a memorandum of law, moved for a consolidation of these three indictments. It was then that a plea of guilty was entered, so that the Government's contention then and now is that the series of transactions were one and the same for all indictments. 278
They were not one crime, because three statutes happened to cover that one series of transactions, but it was one series of transactions and one sentence was imposed as a result of these pleas to these indictments.

Now the defendant mentioned, although it is not material, that one of the indictments had been barred by the statute of limitations. That is not true.

The Court: We will dispense with that.

Mr. Shears: Yes, we will dispense with that. 279

The Court: His lawyer did not take advantage of it.

Mr. Shears: No.

The Court: It is unfortunate.

Mr. Shears: One of the contentions of my learned opponent is that an order entered by Judge Inch in the Eastern District court now prevents your Honor from imposing sentence because Judge Inch purports to do, in this order, according to the interpretation of my opposition—

The Court: Let us get right to the gist of it.

280 Mr. Shears: Yes.

The Court: I think the crux of it is what was the original sentence.

Mr. Shears: The original sentence in this case was that the imposition of sentence is suspended.

The Court: Under what are you holding him?

Mr. Shears: We are now holding him at this time under the Greenhaus case. We have not as yet tried the probation violation because we feel that the Greenhaus case bars the Government from trying that.

The Court: Go ahead with your argument.

281 Mr. Shears: Just so that the Court will understand what the issue is here, the complaint in this case and the probation violation or the warrant for probation violation have nothing to do with this argument at all. This argument is prefaced on one thing only, the Greenhaus decision.

The Court: The argument is on the habeas corpus.

Mr. Shears: That is right.

The Court: By what right are you holding the defendant?

282 Mr. Shears: We are not holding him.

The Court: Is the defendant out on bail?

Mr. Shears: Yes, your Honor.

Mr. Karasik: He is out on bail.

The Court: I am going to ask you a question: are you satisfied that you are here arguing on the habeas corpus when a man is out on bail?

Mr. Shears: I argued that once before, at the time the writ was drawn before your Honor.

The Court: Yes.

Mr. Shears: You said in that case you would

not consider it in order to raise this issue, and I am willing to go along despite the fact that I feel 283
he should not be out on bail. I am willing not to raise that point.

The Court: My point, again, is this: it is as sure a question of law as can be presented.

Mr. Shears: That is right.

The Court: Can a man, or a prisoner, be out on bail? Can you grant or hear an application for a writ of habeas corpus? The writ of habeas corpus means that the person in whose custody he is shall produce him. He is now in nobody's custody. I know that has been passed on thousands of times. Have you looked it up? 284

Mr. Griston: We have looked it up; yes, your Honor.

Mr. Karasik: We have looked it up, and we have briefed it in our memorandum.

The Court: Are you satisfied when a man is out on bail that a Court can hear argument on the return of the writ of habeas corpus?

Mr. Shears: Under these facts I am satisfied that it can be done.

The Court: You have looked it up?

Mr. Shears: Yes, I have looked it up; it is not generally done, but it is in your discretion. You 285
have already passed on that point over objection of counsel for the Government, and so I will not raise the issue at this time.

The Court: What did I pass on?

Mr. Shears: You said that you would grant bail, over my objection.

The Court: You do not object to the Court's denying you, and bail has been granted and he is at large?

Mr. Shears: Yes.

286 The Court: Can you then hear argument, or must a man be in actual custody and not out on bail in order to entitle him to be heard on a writ of habeas corpus? I am asking an entirely different question. If I allow him to go out on bail does he forfeit any right to get a writ of habeas corpus?

Mr. Shears: He does not: that is within your discretion, to do that.

The Court: Did you look that up?

Mr. Shears: Yes; you have a right, in your discretion. You have that right.

287 The Court: Have you looked it up?

Mr. Karasik: Yes, your Honor.

The Court: Is it discretionary?

Mr. Karasik: Yes. I am going to quote from a case.

The Court: You have briefed that?

Mr. Karasik: Yes, I have submitted the brief to your Honor, and here is a portion of an opinion in a case.

The Court: You say you have not done it?

Mr. Karasik: I have already done it, your Honor, it is in that memorandum. I shall submit the copy

288 if you want me to.

The Court: I mean with your other argument?

Mr. Karasik: Yes.

The Court: If I have no jurisdiction I do not want anything to do with it.

Mr. Karasik: You have jurisdiction, your Honor.

The Court: You are asking me about bail; I do not think you have submitted a brief about that.

Mr. Karasik: I have, your Honor; I did.

The Court: Did I write an opinion on it?

Mr. Karasik: No, you just let him out on bail.

Mr. Shears: There was no argument on that.

Mr. Karasik: Then the point is not being raised; 289
the man is here now.

The Court: I remember the incident when you applied for the writ of habeas corpus, and you also asked that he be placed on bail.

Mr. Karasik: That is correct; it was consented to.

Mr. Shears: There is no issue on that, your Honor.

The Court: I did not read your brief.

Mr. Karasik: We had a brief ready, but it was *not necessary. The* Government consented to that.

The Court: Go ahead. If I must assume juris- 290
diction I will. If not it is so complicated that I won't. I did not pass on that point yet, did I?

Mr. Shears: No.

Mr. Karasik: But, if your Honor please, the Government stipulated to that and as far as the authority in the Court to do that, permit me to read from *a decision in the case of Ex parte Thaw, 209 Fed.*

The Court: I will take your brief on that.

Mr. Shears: I suggest that he submit on that point.

Mr. Karasik: All right.

Mr. Shears: This is not an issue at the present 291
time.

Mr. Karasik: That is not an issue at the present time.

The Court: It certainly is an issue.

Mr. Karasik: No.

The Court: Suppose a man is out on bail and a writ of habeas corpus fails because he is not in custody, he is at large. That is fundamental. I know that the writ reads to the man who has got him

in his custody, to produce him. No one has him
292 in his custody now.

I do not say that you are right, but he says it is not in issue; it is fundamentally in issue. It underlies the whole issue.

Mr. Griston: May I point this out, your Honor? At the moment when the writ was sued out he was actually in custody. Then the writ was taken out, and that is the proper basis for the writ. Thereafter, for matters of convenience, we stipulated that he could go out on bail. That did not invalidate the fact that at the time of the writ he was
293 in custody.

The Court: Well when a writ has been issued and he has been taken out, the Court has jurisdiction.

Mr. Karasik: Correct.

The Court: Is that the law?

Mr. Griston: That is the law.

The Court: That is fundamental.

Mr. Griston: Yes.

The Court: I have got to be satisfied as to that. I do not say that you are entirely wrong.

Mr. Griston: All right.

The Court: But you must know that they are
294 right, they are probably right. You are both good lawyers before me. As I say, you are on the other side. You should have looked it up to see if I have jurisdiction.

Mr. Shears: I have looked it up, and I will state for the purposes of the record that I agree with counsel on the other side.

The Court: That I have jurisdiction?

Mr. Shears: Yes.

The Court: Go ahead.

Mr. Shears: Now there are only two issues in this

case. One is whether Judge Inch's order of December 16th, 1935— 295

The Court: Is that the original order?

Mr. Shears: No, that is the order discontinuing probation reporting.

The Court: What bothers me now is what was that original sentence?

Mr. Shears: I am coming to that; that was my second point. The other issue is whether that original sentence was legal or not. The Government contends it was not legal and it uses as a case directly in point the Greenhaus case and your own decision in that Sewell case which follows the Greenhaus case. 296

The Court: Did you see that decision?

Mr. Griston: Yes, your Honor, we will distinguish it later on.

Mr. Shears: Now disposing of the issue as it arises, we will proceed first with the issue of Judge Inch's order signed in the Eastern District of New York, which purports, according to their interpretation, to discontinue any probation proceedings in this matter. The Government's contention is that Judge Inch had no jurisdiction either as a matter of time, because the term of court had long expired, inasmuch as the original sentence was imposed in 1934 and this was not until December 16, 1935, that this order was issued,—incidentally he was not in the Southern District of New York—so that he could in no way modify that sentence. 297

The Court: That may all be. I was going to interrupt to ask whether he had any further jurisdiction after the ninety days, but assuming the judge acts without further jurisdiction after ninety days—can the judge who is in a coordinate jurisdiction question his right to act?

Mr. Shears: Yes, he may, because a judge may
298 modify—

The Court: I do not care for your opinion; have you got the law?

Mr. Shears: I have the law, and I will submit it to you in the brief.

The Court: That is one of the points of law.

Mr. Shears: Yes.

The Court: Being of coordinate jurisdiction; I do not know about that. Must there be an appeal?

Mr. Shears: No, there need not be an appeal; you may modify his order if it lacked jurisdiction in the original instance.

299 The Court: If you have the law on it all right.

Mr. Shears: I have the law, and I will submit it to you.

The Court: Proceed.

Mr. Shears: The law is outlined here (indicating memorandum).

The Court: That brings us down to the original point.

Mr. Shears: To the second point, whether this case comes under the Greenhaus case or not.

The Court: What was the effect of the original
300 sentence, put it that way?

Mr. Shears: The original sentence which purported to put this man on probation after a term is illegal under the Greenhaus holding, and as a result there was no sentence on these two indictments, namely, C80-944, and C96-120, so it is the duty of your Honor at this time to sentence him under these two indictments upon which no sentence was made, under the Greenhaus decision.

The Court: We are all agreed, then, that the effect of the original sentence was a sentence of two years.

Mr. Shears: That is right.

The Court: And nothing else? 301

Mr. Shears: That is correct; that is the Government's position.

The Court: Now I will ask you: why shouldn't the judge who imposed the original sentence, just on your argument, do the re-sentencing?

Mr. Shears: He may, but you also have the right, inasmuch as this judge is one of the Eastern District Court, and he is *not now sitting in the* Southern District; you have the right to take the jurisdiction in the Southern District, where it belongs.

The Court: Are you people satisfied that Judge Inch passes on it? 302

Mr. Karasik: Yes, your Honor, Judge Inch knows all about it. Judge Inch has discussed it with the probation officer both for the Southern District and the Eastern District, and I am pretty sure we should go before Judge Inch.

The Court: On your argument it is up to the Court to impose sentence. I do not know what Judge Inch meant to do. He gave him two years. That is agreed. But did he need to give him a jail sentence, if anything a year or two years, or anything? This was on pleas, you say? 303

Mr. Griston: He has answered that, your Honor.

The Court: It was on plea?

Mr. Griston: It was on a plea of guilty, and he has answered that. He said he gave him a very stiff sentence, two years and a thousand dollars fine, on a plea of guilty, where he saved the Government the time and expense, and it was only for a violation of a passport law; I mean it was a very inocuous thing. He said, "I gave him an awful stiff sentence," and the man is suffering from heart trouble.

The Court: Do you object to going before Judge
304 Inch?

Mr. Shears: Well, Judge Inch would object to taking the case; he has already indicated that in the last hearing which we had before him.

Mr. Griston: He has not taken it.

Mr. Shears: He said that this case should come before the Southern District of New York and before Judge Bondy, and not before himself.

Mr. Karasik: I respectfully and emphatically challenge that statement. I would like to be shown where it is. Judge Inch did not make any such statement. If anything, I will tell you what he
305 said. I suggested that Judge Inch entertain argument on the writ of habeas corpus and the other side did not answer anything about it at all. After the hearing was adjourned Judge Inch said, "Well, the other side weren't apparently anxious for me to hear the argument," so Judge Inch never expressed himself. Another thing—

Mr. Shears: May I interrupt at this point?

Mr. Karasik: Just a moment.

Mr. Shears: Not if you are going to a new point.

Mr. Karasik: All right.

306 Mr. Shears: On page 29 of the hearing this is what happened:

> "Mr. Karasik: And I think it will be agreeable to the United States Attorney. You are very familiar with this proceeding, and I should think myself, and I believe that Judge Bondy would be agreeable, that your Honor being so familiar with the history of this case, that we argue before you and have consideration of my contentions in the habeas corpus proceedings.

I would like your Honor, if you will, to hear argument, and I am sure Mr. Shears would have no objection." 307

Then the Court said:

"The Court: Well, thank you, but I am not designated here at all. I haven't any authority to sit in this district except I have got a right to come over here and resettle an order, but I haven't any right to come over here and hear a writ of habeas corpus that is not dependent upon my order at all, it is aside from that." 308

Mr. Griston: That is true.

Mr. Shears: Just a moment.

Mr. Griston: I am sorry.

Mr. Shears: (Continuing reading) "The only argument that you could make in which my order would appear would be that the law is as follows, but that Judge Inch by an order of probation has modified it in some way. Then you could argue my interference as being necessary. But where you say it doesn't make any difference what Inch, J. decided, there is no probation but the law says that this man can be arrested any time within the limit of the sentence that could have been imposed by Judge Inch, why, you are arguing something that any Judge over in this district can decide without me. I am much obliged." 309

Mr. Karasik: One moment. This only refers to the argument on the writ of habeas corpus. I suggested in the beginning of this colloquy that Judge Inch take cognizance and hear argument on the writ

of habeas corpus. Never was any discussion had
310 upon Judge Inch resentencing him, and I went further, if your Honor please, to go on the record that we do not concede at this time that whether your Honor or Judge Inch has the right to resentence him because there was no breach of probation, there was no order of probation either oral or otherwise, why, Judge Inch relieved him from probation by that order of December 16, 1935.

Mr. Griston: May I add this, your Honor, and this will probably help clear up some things: if they claim that they are not urging a breach of proba-
311 tion, but they claim a right to sentence him under the original plea of guilty, which I understand now is their argument—

The Court: Is that your argument now, that he is to be sentenced on the original plea?

Mr. Shears: The writ of habeas corpus raises that issue only.

Mr. Griston: I would like to make out what their position is. I will take either side now. If it is a position that he should be sentenced under the original plea of guilty, he is not here on that because the warrant here brings him in for violation of the
312 probation of an order of March 26, 1934, which order was terminated by Judge Inch's order, which is a valid order standing and which your Honor cannot ignore—I do not think your Honor would want to ignore it—and which they can test on appeal, and which they made a motion on to set aside and it was denied.

Mr. Shears: I object; there was no denial. In fact it was granted.

The Court: What did Judge Inch decide?

Mr. Griston: They moved to vacate, and the motion was denied. Then they did this— 313

Mr. Shears: It is all incorrect; I will state the correct position.

Mr. Griston: Will you please permit me to make my observation, and then you correct me if I am wrong.

The Court: Go ahead.

Mr. Griston: Then they said to the judge, "Will your Honor insert the word 'probation terminated' instead of 'proceedings terminated' " and the judge said this, "I will insert the word 'probation' in my order if you will submit such an order to me." Now 314 if he did even that; "terminated probation proceedings," and if he did it nunc pro tunc we come forward with these two points.

The Court: What did he decide?

Mr. Griston: He decided that if they submit the order—I will read it to you; that is the best way.

Mr. Karasik: May I give you the minutes (handing to Court).

Mr. Griston: Let me read the words. I think it is on page 29.

Mr. Karasik: I want your Honor to note that I have just handed you a copy of the minutes that 315 he is reading from now.

Mr. Griston: "My decision is"—page 29—"to resettle this order so as to insert the word 'probationary' in front of 'proceedings,' ".

The Court: What did he mean? Read it.

Mr. Griston: All right. Now I will read the order, if I may. This is the order:

> "Ordered, that the order of probation made herein on the 26th day of March, 1934—" that

316 is the order that they claim he violated—"and which is in force and effect by the standing probation order of this Court, be and the same is hereby revoked and the defendant is discharged from further supervision and the proceedings against him in this cause be and the same hereby are terminated," and there he said, "I will resettle to insert in front of the word 'proceedings' the word 'probationary' so as to make it 'terminated the probation proceedings.' "

317 Now let us look at it in two ways, if I may so state. I have stated—and the record sustains what I said before when he says I was incorrect—first, if it was only the probation proceedings that were terminated, he is here for violating the probation, and that being terminated there is nothing to violate.

The Court: Except he said that the judge had no right to make such a sentence.

Mr. Griston: Oh, you do not test it that way; you test it by appeal from the order.

The Court: That may be entirely without jurisdiction.

318 Mr. Griston: Even so, that is tested on appeal from that order.

The Court: He said he has briefed it.

Mr. Griston: Oh, he has not; he has not done anything of the kind.

The Court: Is that when a judge has coordinate jurisdiction or has assumed jurisdiction, that his colleagues cannot question him; is that right?

Mr. Griston: Not in this case. May I come to that in a moment if your Honor will bear with me,

because I want to make one other point, and then I will come to the point that your Honor has raised. 319
The other point is this: the order as originally entered, the original order did not merely terminate the probation proceedings. It terminated the proceedings. Now they have a dead proceeding, a closed, paid-up proceeding. There is nothing on which to proceed and an order entered—

The *Court: Unless that order* is not worth the paper it is written on.

Mr. Griston: And may I add this, you cannot nunc pro tunc create an order which he is going to have violated by an act he already has done. 320

Now on the point that your Honor raises; there was nothing wrong here with this order, for these reasons, and it will be perfectly obvious to your Honor: there is not any question that the Court had power. This is not an exercise of a right that the Court did not have. It is not a case where somebody who is not a judge acts as a judge. It is a judge of the court, of the Federal Court who had sat in a case over whose probation proceedings and over whose orders he has at all times had jurisdiction, who exercised the right that he had as a matter of law and as a matter of practice, and if he should 321
not have as a matter of routine done so, it was a power that he had, and having exercised that power it cannot be disturbed. In the next place, that order was by the judge who sat in the hearing, who had the probation on notice to the probation officer, as required by law, and filed in the Southern District of New York. It is an order filed in this court as required by law, so it is an order on file with this court. Next, the order here—they move here

to resettle the order, and to amend it, and they
322 moved it in this court, and on their motion the matter was referred to Judge Inch to hear it, and he heard it. I have read to your Honor what he said; he resettled, nunc pro tunc. They have recognized the validity of that order, so not only is it a valid order of this court, not only did the Court have the power to grant the order, not only has the court power over all that, not only has it been on file in this court, but it has been recognized and validated. This is a probation, your Honor. It is a continuing term. It is not resentence. There
323 was no sentence. Then how could there be a resentence? You cannot resentence after ninety days. With a probation, you can declare it null; you can also declare it at an end or you can also recall and sentence a man; you have that right, except that the sentence must be within the term, so that here the Court had power to do that. We will brief it. They are raising the question of venue.

The Court: How do you distinguish my former case from this?

Mr. Griston: Your former case?

The Court: You said you would distinguish my
324 case.

Mr. Griston: What was the case? I do not know what the case is.

Mr. Karasik: I saw the case yesterday in the library; I read that decision.

Mr. Griston: The Greenhaus case?

Mr. Karasik: No.

The Court: I decided a case similar to this.

Mr. Karasik: You decided the case, and I only saw the reference to it in the brief, in the Lawyer's County library.

Mr. Griston: Your Honor, we have not seen that case; it has not been briefed, and I do not know 325
of any such decision that your Honor made; I would like to look at it. I think we are entitled to see it.

The Court: I know the question was up before me.

Mr. Griston: What were the circumstances?

The Court: The question before me was just like the one raised here. There were separate indictments, and the sentence was at the same time. The sentence was a prison sentence on one indictment, and on the others I suspended sentence. I held that it must be regarded that the object of the 326
law was to avoid sentencing a man to jail—if you once send him to jail you have no right to place him on probation.

Mr. Griston: Will your Honor bear with me?

The Court: That is my case, isn't it?

Mr. Shears: Yes, that is your case and this is the same case.

Mr. Griston: Was that a single transaction or a separate transaction?

The Court: Two separate indictments.

Mr. Griston: All right, that is different.

The Court: I claim under that Greenhaus case 327
that the purpose was to avoid sending a man to jail, if you could help it, and it is inconsistent to send him to jail and at the same time grant him a probation. That is the way I understand to be the Murray case and the Greenhaus case.

Mr. Griston: I am familiar with the Murray case and I am familiar with the Greenhaus case, but let me say this: I discussed the Greenhaus case, but before I go to that I say the Greenhaus case is not here.

The Court: I understand that. You have different
328 features here.

Mr. Griston: I say we have not reached the Greenhaus case.

The Court: I understand that.

Mr. Griston: Because the warrant here does not raise any charge.

The Court: I understand.

Mr. Griston: But if we get to the Greenhaus case—and I do not think we ever do, not on this warrant—maybe on another warrant—but if we do then I point this out to your Honor: suppose a
329 man is tried on one indictment for arson, and under another indictment for larceny. Those are two different crimes committed at different times. Now you cannot say that because a judge wants to let him go under one that he must let him go under the other, or because he wants to hold him upon one heinous crime that he has to do it under the other, too.

The Court: I imagine that the distinction there, from practical experience—I am here every day—that if a man is indicted and pleads guilty—I would not ask him whether he has actually been in jail,
330 but I suspend or not. As you say, it is a separate indictment and a separate transaction but the question is whether it is done simultaneously: can you send him to jail and place him under probation?

Mr. Griston: The only thing is this: in the Greenhaus case it was one indictment.

The Court: Transaction.

Mr. Griston: No, further than that, the same transaction. Here you have transactions in different years, in different countries: one in France.

One is the passport question which was at a different time. 331

The Court: I do not blame you. I have difficulty in understanding, and so do you. I do not know what that would amount to.

Mr. Griston: Let me go further. I think this will simplify the matter. The Greenhaus rule, as now enunciated is a harsh rule. I do not think it should be extended beyond the four-square corners of that decision, and this being a different case, where Judge Inch says, "I have been unusually hard on this man"—he is a very sick man, he has not long to go—"I am going to let him out." I do not 332 think we ought to extend that.

The Court: I won't extend it.

Mr. Griston: That is what they want to do.

The Court: I think the decision is one for a very good purpose.

Mr. Griston: It has its purposes.

The Court: I think the idea of sending a man for a short time to jail and giving him probation is a good thing.

Mr. Griston: Yes. Now your Honor there is one more thought that I forgot to mention.

The Court: I agree with you. It is a pure ques- 333 tion of law. I will hear your adversary.

Mr. Griston: May I add one more thought, which I forgot?

The Court: You have it all messed up, though.

Mr. Griston: It is a messed up case, because they are hounding this man. If they have a crime against him let them indict him, but they cannot do it. However, there is one thought I forgot, I have mentioned it but I think I ought to call your Honor's attention

to it, in the Hollandsworth case, the case that they
334 rely on, and the Court said this: "You cannot hold a man for violating the terms of probation unless the terms have been given to him and then you can hold that he violated those terms."

Here not only have we no terms given to him, he was out; there were no terms for him to violate, under the Hollandsworth case that they rely on.

The Court: I understand that; the judge said during good behavior.

Mr. Griston: They did not say that; they said nothing of the kind.

335 The Court: I understand.

Mr. Griston: Now may we have a couple of days to put in a brief on this? They have given us their brief, which is about fourteen pages, and I would like to have a couple of days to reply to it.

The Court: Exchange briefs.

Mr. Shears: They have had over a week to put in their answer, Judge. I submitted my brief to them on the 15th, in accordance with your order.

The Court: I know you want to dispose of the thing on the merits. You want to know their points. If that is one good case that ought to be taken up,
336 it ought to be taken up.

Mr. Shears: Certainly. Now the issue raised by my adversary is this: that if you hold that this is not within the foursquare walls of the Greenhaus case then they are guilty of violating the probation. If you hold that it does come within the Greenhaus probation decision we do not need a ruling, because under your own ruling in the Sewell case he will go back to jail.

The Court: I understand there are distinctions

so that if you can cover them by the briefs you do so. 337

Mr. Shears: I have done that long before this date; I was ready two weeks on this case.

The Court: In the Greenhaus case the probation means nothing.

Mr. Shears: That is right; the same thing here.

The Court: Then there was the sentence.

Mr. Shears: That is correct here also.

The Court: Then what did he violate? What is he being held on now?

Mr. Shears: In the Greenhaus case?

The Court: No, in this case. For what are you holding him? 338

Mr. Shears: We are holding him on probation violation which they claim is no good. They raise it.

The Court: Was that probation sentence good?

Mr. Shears: It was not, according to the Greenhaus case, but that case arose after this probation violation, and if your Honor will recall the Greenhaus case arose on exactly the same grounds: it was a probation violation in the Greenhaus case, a writ of habeas corpus raised an issue and the appeal went up on the writ of habeas, just as this one. 339

Mr. Griston: But there there was a violation of the terms of the probation and the Court exercised the right that it had.

Mr. Shears: And he did, exactly foursquare on this issue.

The Court: You say "foursquare." What is the probation?

Mr. Shears: If your Honor followed the same rule as you did in the Sewell case he will go back

to jail for four years, which was the term of pro-
340 bation.

The Court: Was he sentenced to four years?

Mr. Griston: No.

Mr. Shears: He was sentenced to four years' probation.

Mr. Griston: No.

The Court: Read that to me.

Mr. Griston: "Imposition of sentence suspended."

The Court: Read that to me.

Mr. Karasik: "Imposition of sentence sus-
341 pended."

The Court: Therefore there is no sentence, so it could not be for four years.

Mr. Shears: There is no sentence when the execution is suspended.

Mr. Griston: That is different.

Mr. Shears: There is no difference in the probation law. The probation law is exactly the same on both issues.

Mr. Karasik: Here is what it says: "Imposition of sentence suspended, the probation for four years to begin after serving sentence on C 96-116 subject
342 to the standing probation order of this court, Inch, D. J."

The Court: I will have to study it.

Mr. Griston: May I ask one further thing: Is there another brief that you are going to put in in this case?

Mr. Shears: No, I do not intend to have another brief, not after the 15th of December brief.

Mr. Griston: Thank you.

The Court: Now give me all the papers on the matter.

Mr. Griston: May we have, then, until Thursday noon? 343

The Court: Give me all the papers.

Mr. Shears: Bail will be continued, then? Your Honor will continue bail in this matter.

The Court: Yes.

Mr. Shears: I would like to know what cases counsel is submitting.

Mr. Griston: We will get together on that.

Mr. Karasik: I will submit the papers to you before I hand them up to the Court.

Mr. Shears: Here are the Government's papers in exchange (handing documents to the Court). 344

The Court: Are there any appeals involving that Greenhaus case now pending in the office?

Mr. Shears: No, this is the only case.

The Court: You ought to get your best case.

Mr. Shears: This is the best case in issue in the office at the present time.

Mr. Griston: And this does not approach the Greenhaus case. It does not involve it because of the warrant which they have. Maybe under a different warrant. Now may I have the Sewell case that your Honor was asking me the details of?

The Court: It is a case I decided. 345

Mr. Griston: Yes; I would like to have that so we can use it.

Mr. Karasik: If your Honor please, just one more thing: the petition for the writ of habeas corpus here is entitled "The United States of America ex rel Frad against John J. Kelly, U. S. Marshal, Southern District of New York." Their return, however, changes the caption without any right or warrant, and the title there is "United

States of America ex rel William D. Frad alias
346 Edward Swift alias Fred Warren Gorham," and I ask your Honor that the return be made to conform with the original petition.

The Court: You mean the caption?

Mr. Karasik: The caption, yes.

Mr. Shears: We have merely used the defendant's names as in the first case upon which we were arguing.

The Court: The caption is no part of the papers; those are two captions.

Mr. Karasik: Thank you, your Honor.

The Court: Give me all the papers I need. Where
347 is the writ?

Mr. Karasik: The writ is there; you have the return and here is our traverse to the return, with the minutes annexed to the exhibits (handing documents to the Court).

Mr. Shears: And have you given his Honor a copy of your brief?

Mr. Karasik: We have a copy of the brief, but it is not complete; I will give you a copy.

Mr. Shears: Then you can amend that later on.

Mr. Karasik: Yes, and we will give you the
348 original brief.

(Hearing closed.)

Notice of Motion to Commit Relator

349

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, —*against*— WILLIAM D. FRAD alias Edward Swift alias Fred Warren Gorham, Defendant.	C-80-944 C-96-120

350

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 22nd day of December, 1936, and upon all the proceedings heretofore had in this action, the undersigned will move this Court in Room 318 of the United States Court House, Foley Square, New York, on the 351
28th day of December, 1936, at 10:30 in the forenoon or as soon thereafter as counsel may be heard, for an order committing the above named defendant, William D. Frad, to a penitentiary to be designated by the Attorney General of the United States and for such other, further and different relief as to the Court may seem just and proper.

Notice of Motion to Commit Relator

Dated: New York, N. Y., December 22, 1936.

352

LAMAR HARDY,
United States Attorney,
Southern District of New York,
Attorney for Plaintiff,
Office & P. O. Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

353

LOUIS KARASIK, ESQ.,
50 East 42nd Street,
New York City.

354

Affidavit of Curtis Charles Shears, Dated December 22, 1936

355

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, —*against*— WILLIAM D. FRAD, alias Edward SWIFT, alias Fred Warren Gorham, Defendant.	C-80-944 C-96-120

356

State of New York,
County of New York,
Southern District of New York, *ss.*:

CURTIS CHARLES SHEARS, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York in charge of the above mentioned cases.

That on June 16, 1931, an indictment was filed, C 80-944, charging above defendant with violations 357
of Sections 220 and 221, Title 22 of the United States Code, and Section 102, Title 28 of the United States Code, on February 21, 1934, indictment C 96-116 was filed, charging violations of Section 88, Title 18, United States Code, and on March 5, 1934, indictment C 96-120 was filed, charging violation of Section 220, Title 8, United States Code, and Section 22, subdivision (b) of the Immigration Act of 1922.

On the 26th day of March, 1934, the day of trial, defendant pleaded guilty to all three indictments

358 before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting at a term of Court in and for the Southern District of New York. Judge Inch sentenced the defendant on indictment C 96-116 to two years imprisonment and to pay a fine of $1000, for which he was to stand committed until the fine was paid. On indictments C 80-944 and C 96-120 Judge Inch suspended the imposition of sentence and placed defendant on probation for four years, to begin after defendant had served the sentence on
359 C 96-116.

Pursuant to the aforesaid sentence, defendant was confined in the United States Northeastern Penitentiary, Lewisburg, for the term of two years, less allowance for good behavior, and paid the aforesaid fine. On November 2, 1935, petitioner was discharged from the aforesaid penitentiary.

On December 16, 1935, after three day notice to the chief probation officer for the Southern District of New York, a hearing was held before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the
360 Eastern District of New York at the Federal Building, Brooklyn, New York, on an application for an order to discharge defendant from probation and from further supervision and to terminate the proceedings against him in this case. An order was submitted with the notice of motion to the following effect:

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is

discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

This order was signed by Judge Inch on December 16, 1935.

In view of the decision in the case of *United States of America v. Charles H. Greenhaus*, 85 F. (2d) 116, in this Circuit, and *Ex parte United States*, 242 U. S. 27, both of which cases holding that under similar circumstances the trial court was without power to suspend sentence and that it was the duty of the District Court to vacate the order of probation and enforce the sentence by ordering the defendant to prison.

WHEREFORE, deponent prays that an order issue committing this defendant for the period of the unserved portion of his sentence of March 26, 1934, to wit, four years in a place to be designated by the Attorney General of the United States, and for such other, further and different relief as to the court may seem just and proper.

CURTIS CHARLES SHEARS.

Sworn to before me this
22 day of December, 1936.

LEO COHEN, Notary Public
N. Y. Co. Clks. No. 156, Reg. No. 8C169
Bronx Co. Clks. 13 Kings Co. Clks. 131
Commission expires March 30, 1938.

Hearing on December 28, 1936

364 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,

Plaintiff,

-vs-

HONORABLE JOHN J. KELLY, United States Marshal for the
365 Southern District of New York,

Defendant.

Before:

HON. WILLIAM BONDY,
District Judge.

New York, December 28, 1936;
10.30 o'clock, a.m.

366 Appearances:

LAMAR HARDY, ESQ.,
United States Attorney, for the Government;
By Curtis C. Shears, Asst. U. S. Attorney.

LOUIS KARASIK, ESQ.,
Attorney for Relator.

Hearing on December 28, 1936

MOTION FOR AN ORDER COMMITTING WILLIAM D. FRAD TO A PENITENTIARY

Mr. Shears: If your Honor please, this is material at this time for this matter only; that if your Honor decides that the Greenhaus case applies to this state of facts, then there will be the necessity of having a remanding order under the Greenhaus case. We are now arguing the notice of motion for sentencing under the Greenhaus case.

The Court: You are now arguing this motion on your theory of the Greenhaus case.

Mr. Shears: No, we have done that. The only reason is it is necessary to have some paper or proceedings on which your Honor can remand this defendant, otherwise the Government has no paper on which to remand this defendant.

The Court: If I should discharge him on the other to remand him on this?

Mr. Shears: That is right. We are arguing this only if the Greenhaus case holds that he should be remanded on this state of facts. That is the only argument.

Mr. Karasik: The point is not quite as clear as the Government counsel tries to make it. Here is what we are trying to press: wherefore defendant prays that an order issue committing this defendant for the period of the unserved portion of his sentence, to wit, four years.

Mr. Shears: Read the rest of it.

Mr. Karasik: In a place to be designated by the Attorney-General.

Mr. Shears: Or—

Mr. Karasik: Or for such other and further relief—

Mr. Shears: That is it.

370 Mr. Karasik: Now where is the sentence? Imposition of sentence was suspended.

The Court: I understand the Greenhaus case to hold—in this case there was a dual sentence; is that right?

Mr. Karasik: On one indictment; there were three indictments.

The Court: That is your distinguishing feature?

Mr. Karasik: We do not urge that. Here there isn't anything for this motion to be passed upon. There was no sentence in these cases. The imposition of sentence was suspended. They could, if 371 there were merit to it, issue a warrant to bring him in under the original sentence. This is not it.

The Court: Here the contention, as I understand it, is that there was a suspension of sentence. Now if there is any reason to do it you should get a warrant and I should resentence him.

Mr. Karasik: This does not do it.

Mr. Shears: The fact that it states "for such other and further relief" gives your Honor the power.

The Court: You do not need any power under 372 their contention. This hearing is to clear the thing up.

Mr. Shears: That is the only point we wish to make at this time.

The Court: You can ask that he be brought up—

Mr. Karasik: If they have a right then there must be a hearing on it.

The Court: He said it was conditional. If you want a sentence the way is to bring him up for sentence, then they can raise legal questions.

Mr. Shears: He is on the calendar for today, and he is here, and I ask your Honor to make a conditional remanding of this defendant provided your Honor decides this writ of habeas corpus for the petitioner. 373

The Court: He will have to be here.

Mr. Shears: He is here.

Mr. Karasik: He has been here every time that was necessary. There is one thing, if your Honor pleases—

The Court: I am prepared to say that if I find the original sentence to punish this man—say two years in jail—was he in jail?

Mr. Karasik: Yes. 374

The Court: Rather than give him a conditional sentence the Greenhaus case provides we would have to give him a sentence of four years. I wouldn't do that, I would give him the opportunity to ask for a pardon—what the Circuit Court did.

Mr. Shears: The Government's position is if you have the power to decide in favor of the petitioner that you should send him to Judge Inch for sentence.

The Court: They will agree to that?

Mr. Karasik: We will agree to that. 375

The Court: Then he should be resentenced on the original time.

Mr. Shears: We are asking for that.

Mr. Karasik: I will produce him at any time.

The Court: If you will notify counsel they will produce him in court.

Mr. Karasik: He is here now.

Mr. Shears: The Government asks that he be remanded for the purpose of sentence.

Mr. Karasik: I ask that he be continued in bail.
376 He is in bail on the original charge.

The Court: I will continue bail.

Mr. Karasik: There is nothing then to remand on, because the whole matter was terminated as if there had been an acquittal.

The Court: He is under bail. He probably is uncertain by reason of that decision. When we get through with it I will indicate what the practice should be. I do not think there will be any difficulty about it. You want an opportunity to raise your question.

377 Mr. Shears: I ask that you set the bail at $5,000 if you release this man from the writ of habeas corpus.

The Court: He will not put any obstacles in the way of your controlling the defendant. They want to preserve their right.

Mr. Shears: But your Honor should set bail in case you grant that writ.

Mr. Karasik: We have just received their brief. May we have until Wednesday to submit?

Mr. Shears: I ask that no decision be made until such time as this defendant is before your Honor
378 so that you may remand him at that time.

The Court: I told you when I decided it I would see to that.

(Motion adjourned to such time as there is a decision.)

Affidavit of Curtis Charles Shears of January 4, 1937

379

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, —*against*— HONORABLE JOHN J. KELLY, United States Marshal for the Southern District of New York.	C-80-944 C-96-116 C-96-120

380

State of New York,
County of New York,
Southern District of New York, *ss.*:

CURTIS CHARLES SHEARS, being duly sworn, deposes and says that he has been an Assistant United States Attorney for the Southern District of New York since January 22, 1934, and was in charge of the preparation for trial of the above mentioned indictments out of which the instant proceedings arise:

381

That indictments C 96-116 and C 96-120 were prepared and filed by your deponent after he was placed in charge of the trial of C 80-944, which was filed June 16, 1931.

That indictments C 96-116 and C 96-120 were filed by your deponent after a study of indictment C 80-944, to make more certain the legal sufficiency of the allegations of the nature of the crime

382 charged; to wit, concealing his true identity over a period of years for the purpose of carrying on his profession of swindling passengers on the high seas.

That the crime of "Larceny on the high seas" could not then have been sustained for lack of jurisdiction inasmuch as all the evidence of card sharping was on vessels flying foreign flags and registered outside of the United States.

That after *due notice to defendant*, the case of William Frad on indictments C 80-944, C 96-116 and C 96-120 was reached on March 21, 1934 and
383 the case referred for trial to the Hon. Robert A. Inch, District Judge for the Eastern District of New York, then sitting in the Southern District of New York, to whom a copy of the Government's trial brief as then submitted.

That the Government moved for a consolidation of indictments C 80-944, C 96-116 and C 96-120 at that time.

That after the case had been moved for trial, and the selection of a jury started, defendant withdrew his plea of not guilty and entered a plea of guilty.

384 That defendant then asked that sentence be deferred until March 26, 1934, the date on which defendant was sentenced on indictments C 80-944, C 96-116 and C 96-120.

CURTIS CHARLES SHEARS.

Sworn to before me this
4th day of January, 1937.

LEO COHEN

LEO COHEN, Notary Public
N. Y. Co. Clks. No. 156, Reg. No. 8C169
Bronx Co. Clks. 13 Kings Co. Clks. 131
Commission expires March 30, 1938.

Opinion of Honorable William Bondy, D. J.

UNITED STATES DISTRICT COURT 385

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,

Relator,

—*against*—

JOHN J. KELLY, United States Marshal for the Southern District of New York, 386

Respondent.

BONDY, District Judge:

March 26, 1934 the defendant pleaded guilty to three separate indictments which had been brought on for trial together on that day. He was sentenced to imprisonment for two years and fined $1000 on one of the indictments. The imposition of sentence on the other indictments was suspended and the defendant was placed on probation for four years 387 beginning after he served the sentence on the first indictment.

December 16, 1935 the judge who had pronounced sentence signed an order pursuant to provisions of 18 U. S. C. Sec. 725, not only revoking the order of probation and discharging the defendant from further supervision but also terminating the proceedings against him.

November 20, 1936, a judge of this court, upon a petition which did not refer to the order revoking the probation and terminating the proceedings, and which stated that the defendant had returned to his criminal profession of card sharper on the high

seas and that he was associating with persons of
388 ill repute, issued a warrant for the arrest of the probationer reciting that it appeared that the "defendant has violated one of the terms of his probation, that is: he has committed larceny by trick on the high seas."

The first paragraph of 18 U. S. C. 725 expressly provides that the court may discharge the probationer from further supervision and may also terminate the proceedings against him. A probationer who has been discharged from further supervision may nevertheless be sentenced at any time within
389 the maximum period for which he might originally have been sentenced. This power to sentence is conferred by the Probation Act and is exercised as a part of the proceedings under that act. *Hollandsworth* v. *United States*, 34 Fed. (2d) 423, 427; *United States* v. *Antinori*, 59 Fed. (2d) 171.

The provision that the court may terminate the proceedings would be useless if it did not add anything to the provision that the court may discharge the probationer from further supervision. Therefore to give it effect it must be held that the proceedings under the Probation Act, if not all pro-
390 ceedings against the defendant, had been terminated when the warrant issued. Accordingly, the relator can no longer be sentenced under the Probation Act.

The fact that after the warrant was issued an application was made to the judge who sentenced the defendant to resettle the order terminating the proceedings and the judge's statement of what he had intended to do or of what he would do if a writ was sustained can not affect the validity of the warrant theretofore issued. No resettlement took place

and therefore the effect of resettlement is not before this court. 391

The Government further contends that all proceedings herein under the Probation Act are void, and that the relator should be committed for that reason. In *United States* v. *Greenhaus*, 85 Fed. (2d) 116, sentence was imposed on all counts of a single indictment and its execution improperly suspended on some counts. In this case sentence was imposed on one indictment only, and the imposition of sentence suspended on the other indictments.

Whether or not the suspension is illegal and void under the rule of *United States* v. *Greenhaus*, there never has been any sentence on which the defendant can be committed. The only theory upon which sentence might now be imposed is that a void sentence is no sentence at all and that a valid one may be imposed at any time thereafter. See *Miller* v. *Alderhold*, 288 U. S. 207. 392

The Greenhaus rule is applicable only if the sentences on all three indictments be considered a single sentence. If however the sentences be considered a single sentence (*Cf. Ex Parte De Bara*, 179 U. S. 316), it must be held that the term of court within which to resentence has long since expired, because a valid sentence was imposed with reference to all indictments. 393

The Government's motion to sentence the defendant on the ground of violation of probation accordingly is denied and the writ is sustained, without prejudice to the Government's right, if any, to a resettlement of Judge Inch's order and proceedings under such resettled order after the entry of the order hereon.

January 13, 1937.

WM. BONDY,
U. S. District Judge.

Order Dated January 26, 1937

UNITED STATES DISTRICT COURT

394

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *—against—* WILLIAM D. FRAD alias Edward Swift alias Fred Warren Gorham, Defendant.	C-96-120 C-80-944

395

A motion having been made by Lamar Hardy, United States Attorney, for an order committing the above named William D. Frad to a penitentiary to be designated by the Attorney General of the United States on the indictments in the proceedings entitled C 80-944 and C 96-120, which motion was returnable on the 28th day of December, 1936,

And there having been submitted in support of said motion the affidavit of Curtis Charles Shears verified the 22nd day of December 1936; the order for a warrant for the arrest of William Frad, made
396 by Hon. Francis G. Caffey on November 20, 1936; the petition for revocation of probation by E. Fred Sweet, verified the 20th day of November 1936; the complaint of W. J. McNulty verified the 19th day of November 1936; the return to a Writ of Habeas Corpus theretofore allowed by this court and filed by the United States Attorney for the Southern District of New York, dated the 8th day of December 1936; the affidavit of John J. Kelly attached to said return, verified the 8th day of December

1936; the affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 4th day of January 1937; 397

And there having been submitted in opposition to said motion, the Writ of Habeas Corpus allowed by this court by the Hon. Francis G. Caffey on the 4th day of December 1936, the order of Hon. Robert A. Inch, dated December 16, 1935, the traverse to the return filed by the relator William Frad, dated and acknowledged the 10th day of December 1936, the transcript of the hearing before Hon. Robert A. Inch on the 8th day of December 1936, and the transcript of the proceedings before the Hon. Robert A. Inch of March 21, 1934 on the indictments known as C 80-944, C 96-120 and C 96-116; and transcript of the arguments before this court on the 21st and 28th days of December 1936; 398

And after hearing Curtis Charles Shears, Assistant United States Attorney in support of said motion, and Louis Karasik, Esq. and Harris Jay Griston, Esq., attorneys for the defendant in opposition thereto,

And due deliberation having been had thereon and an opinion filed under Docket M-17-396 having been filed by this court dated January 13, 1937, 399

Now, on motion of Louis Karasik, Esq. and Harris Jay Griston, Esq., attorneys for the defendant, it is

ORDERED, that the said motion be and the same is in all respects denied.

WILLIAM BONDY.

Dated: New York City
January 26, 1937.

Order Dated January 26, 1937

400 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD, Relator, —*against*— JOHN J. KELLY, United States Marshal for the Southern District of New York, or any other person having charge, custody or control of the body of the relator William Frad, Respondent.	M 17-396

401

A Writ of Habeas Corpus having been allowed by this Court by the Hon. Francis G. Caffey, Judge of this Court, on the 4th day of December 1936, directing John J. Kelly, United States Marshal for the Southern District of New York, or any other

402 person having charge, control or custody of the body of William Frad, by him imprisoned and detained, to produce said William Frad before this court to do or receive what shall there be considered concerning him, and to show cause forthwith why the said William Frad should not be forthwith discharged from custody, detention, restraint and imprisonment,

And the said Writ having come on to be heard before me on the 21st day of December 1936, and

adjourned to the 28th day of December 1936, and it appearing, 403

That on or about the 20th day of November 1936, this court, by order of the Hon. Francis G. Caffey, a Judge of this Court, ordered that a warrant issue for the arrest of said William Frad, it then appearing to the said court that on March 26, 1934, this court suspended sentence on said William Frad in a proceeding known as C 96-120, and had placed him on probation pursuant to the Act of March 4, 1925, and that he had allegedly violated one of the terms of his probation; and the said relator having been thereafter arrested and taken into custody under said warrant by the above named respondent John J. Kelly, United States Marshal for the Southern District of New York, and it further appearing, 404

That on or about the 16th day of December 1935, an order was entered in the said proceeding, by Judge Robert A. Inch, wherein it was provided as follows:

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated." 405

And the relator having submitted in support of said Writ of Habeas Corpus, the Writ of Habeas Corpus allowed by this court by the Hon. Francis

G. Caffey on the 4th day of December 1936, the
406 petition of Ella Frad, verified the 4th day of December 1936, the order of Hon. Robert A. Inch, dated December 16, 1935, the traverse to the return filed by the relator William Frad, dated and acknowledged the 10th day of December 1936, the transcript of the hearing before Hon. Robert A. Inch on the 8th day of December 1936, and the transcript of the proceedings before the Hon. Robert A. Inch of March 21, 1934 on the indictments known as C 80-944, C 96-116 and C 96-120; and transcript of the arguments before this court on the 21st and
407 28th days of December 1936;

And there having been submitted in opposition thereto, the return to said Writ filed by the United States Attorney for the Southern District of New York, dated the 8th day of December 1936; the order for a warrant for the arrest of William Frad, made by Hon. Francis G. Caffey on November 20, 1936; the petition for revocation of probation by E. Fred Sweet, verified the 20th day of November 1936; the complaint of W. J. McNulty verified the 19th day of November 1936; the affidavit of John
408 J. Kelly attached to said return, verified the 8th day of December 1936; the affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 4th day of January 1937;

And after hearing Louis Karasik, Esq. and Harris Jay Griston, Esq., attorneys for the relator in support of the petition for the Writ of Habeas Corpus, and Curtis Charles Shears, Assistant United States Attorney, in opposition to the Writ of Habeas Corpus,

And due deliberation having been had thereon, and an opinion having been filed by this court, dated January 13, 1937, 409

It is now on motion of Louis Karasik, Esq. and Harris Jay Griston, Esq. attorneys for the relator,

ORDERED, that the aforesaid Writ of Habeas Corpus issued on behalf of the above relator be and the same hereby is in all respects sustained, and that the relator be and he hereby is discharged from further custody, without prejudice to the Government's right, if any, to a re-settlement of Judge Inch's order of December 16, 1935, and to proceedings under such re-settlement order, after the entry of this order, on due notice to counsel presently appearing for the relator herein. 410

WILLIAM BONDY.

Dated: New York City.
Januarf 26, 1937.

411

Notice of Appeal

412 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York, Appellant, —*against*— UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, 413 Relator-Appellee.	M-17-396

Name and Address of Appellant:

JOHN J. KELLY,
United States Marshal
Southern District of New York

Name and address of appellant's attorney:

414 LAMAR HARDY,
United States Attorney
Southern District of New York

Offense:
Violation of Probation

Date of judgment:
January 26, 1937

Brief description of judgment or sentence:

On the 20th day of November, 1936, the Honorable Francis G. Caffey, United States District

Judge for the Southern District of New York, ordered that a warrant issue for the arrest of the relator-appellee, it appearing to the said Court that on March 26, 1934 this Court suspended sentence on said relator-appellee in a proceeding known as C.96-120 and placed him on probation pursuant to the Act of March 4, 1925; that he had violated one of the terms of his probation and had been arrested and taken into custody under the aforesaid warrant by your appellant, John J. Kelly, United States Marshal for the Southern District of New York. 415

Thereafter, before hearing on the violation of probation, the relator-appellee obtained a writ of habeas corpus issued by Honorable Francis G. Caffey on the 4th day of December, 1936 and set out as a defense to the violation of probation an order entered in a proceeding held before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the Eastern District of New York on the 16th day of December, 1935, as follows: 416

"ORDERED, that the order of probation made herein on the 26th day of March 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated." 417

418 Upon due notice a motion was made by the United States Attorney for an order committing the appellee to a penitentiary to be designated by the Attorney General of the United States on Indictments C 80-944 and C 96-120. This motion was consolidated with the argument on the writ of habeas corpus before Honorable William Bondy, United States District Judge for the Southern District of New York. On January 13, 1937, Judge Bondy rendered a decision sustaining the writ of habeas corpus and denying the motion of the United States of
419 America. Two orders were entered on January 26, 1937 under the numbers M 17-396 and C 96-120, C 80-944.

Name of prison where now confined:

Relator-appellee is now enlarged on bail.

I, the above named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment above mentioned on the grounds set forth below.

420 Dated: New York, N. Y., January 28, 1937.

JOHN J. KELLY,

John J. Kelly,
United States Marshal,
Southern District of New York,
Appellant.

GROUNDS OF APPEAL

421

The District Court erred—

1. In sustaining the writ of habeas corpus.

2. In holding that the relator "can no longer be sentenced under the Probation Act."

3. In holding that the term of Court within which to sentence this relator on Indictments C 80-944 and C 96-120 had expired.

4. For failing to hold that the relator could be 422
sentenced on Indictments C 80-944 and C 96-120.

5. In denying the Government's motion to commit the relator under the decision of *United States* v. *Greenhaus*, 85 F. (2d) 116.

LAMAR HARDY,
United States Attorney for the
Southern District of New York,
Attorney for Appellant,
Office & P. O. Address,
United States Court House, 423
Foley Square,
Borough of Manhattan,
City of New York.

Assignment of Errors

424 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—*against*—

UNITED STATES OF AMERICA, *ex rel* WILLIAM FRAD,

425 Relator-Appellee.

Now comes the appellant above named, and in connection with his appeal from orders sustaining a writ of habeas corpus and denying a motion to sentence appellee, makes and files the following assignment of errors upon which he will rely on the prosecution of the appeal therefrom:

(1) The District Court had the power and the
426 duty under the decision of *United States* v. *Charles H. Greenhaus*, 85 Fed. (2d) 116, to sentence the appellee on indictments C 96-120 and C 80-944, as the judgment of March 26, 1934 had never been completed.

(2) Even if the *Greenhaus* opinion, *supra*, does not apply to the *facts* of this case, the District Court had the power to sentence the appellee under the Probation Act if the facts warranted finding a violation of one of the terms of appellee's probation.

(3) The order of Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the Eastern District of New York, dated December 16, 1935, is invalid for lack of jurisdiction. 427

(4) The sentencing judge in signing said order of December 16, 1935, meant to do no more, and legally did no more than remove appellee from the supervision of the Probation Officer.

(5) Assuming the *Greenhaus* decision, *supra*, does not apply to this case, the District Court should have dismissed the writ of habeas corpus as "the maximum period for which the appellee might have been sentenced originally" on March 26, 1934 had not elapsed and the Court had jurisdiction and power under the Probation Act to issue a warrant for appellee's arrest. 428

WHEREFORE appellant prays that the orders of the said Court may be reversed, and in order that the foregoing assignment may be a part of the record, the appellant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with law in such matters made and provided. 429

Dated: New York, N. Y., February 25, 1937.

LAMAR HARDY,

LAMAR HARDY,
United States Attorney for the
Southern District of New York,
Attorney for Respondent-Appellant.

Stipulation Settling Bill of Exceptions

430 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—against—

UNITED STATES OF AMERICA,
431 ex rel., WILLIAM FRAD,

Relator-Appellee.

IT IS HEREBY STIPULATED, CONSENTED AND AGREED by and between the United States Attorney and the attorney for the Appellee, that the foregoing record be submitted to the District Judge sitting in Criminal Term to be ordered on file as the bill of exceptions and the transcript of the record in the above entitled matter.

432 Dated: New York, N. Y., February 24, 1937.

LAMAR HARDY,
United States Attorney for the
Southern District of New York,

By:

LOUIS KARASIK,
HARRIS JAY GRISTON,
Attorneys for Relator-Appellee.

Order Settling Bill of Exceptions

UNITED STATES DISTRICT COURT 433

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—against—

UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD, 434

Relator-Appellee.

Upon the stipulation of the United States Attorney for the Southern District of New York, and Louis Kardash and Harris Jay Griston, Esqs., attorneys for the appellee, dated the 24th day of February, 1937.

ORDERED that the foregoing record be ordered on file as a bill of exceptions and transcript of record in the above entitled matter. 435

Dated, New York, N. Y., February 25, 1937.

WILLIAM BONDY,
U. S. D. J.

Stipulation as to Contents of Record

436 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—against—

UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD,

437 Relator-Appellee.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the Record on Appeal from the order sustaining writ of habeas corpus, contain the following:

(1) Indictments C 80-944, C 96-116, C 96-120.

438 (2) Entries on the backs of Indictments under "(1)."

(3) Minutes of proceedings before Honorable Robert A. Inch on March 21, 1934.

(4) Docket entries of C 96-120.

(5) Conditions of probation signed by relator.

(6) Notice of petition and order of Judge Inch dated December 16, 1935. 439

(7) Complaint of W. J. McNulty dated November 19, 1936.

(8) Order for the issuance of a warrant to apprehend probationer dated November 20, 1936.

(9) Petition for revocation of probation dated November 20, 1936.

(10) Affidavit and notice of motion to vacate and resettle above order of December 16, 1935. 440

(11) Notice to relator and surety of sentence on calendar for December 8, 1936.

(12) Hearing on resettlement December 8, 1936.

(13) Allowance of writ of habeas corpus.

(14) Return to writ of habeas corpus.

(15) Traverse to writ of habeas corpus. 441

(16) Affidavit and notice of motion to commit relator, dated December 22, 1936 returnable December 28, 1936.

(17) Hearings of December 21 and 28, 1936 before Honorable William Bondy.

(18) Affidavit of Curtis Charles Shears, dated January 4, 1937.

442 (19) Opinion of Honorable William Bondy, dated January 13, 1937.

(20) Orders dated January 26, 1937.

(21) Notice of appeal.

(22) Stipulation as to contents of record.

(23) Stipulation settling transcript of record.

(24) Order settling bill of exceptions.

443 Dated: New York, N. Y., February 25, 1937.

LAMAR HARDY,
Attorney for Respondent-Appellant.

LOUIS KARASIK,
HARRIS JAY GRISTON,
Attorneys for Relator-Appellee.

SO ORDERED:

WILLIAM BONDY,
444 *U. S. D. J.*

Stipulation as to Record

UNITED STATES DISTRICT COURT 445

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—*against*—

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD, 446

Relator-Appellee.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the foregoing is a true transcript of the Record of the District Court of the United States for the Southern District of New York in the above entitled matter as agreed upon by the parties, and that the Clerk of the District Court may certify the same as correct.

Dated: New York, N. Y., February 24, 1937. 447

LOUIS KARASIK,
HARRIS J. GRISTON,
Attorneys for Relator-Appellee.

LAMAR HARDY,
United States Attorney for the
Southern District of New York,
Attorney for Respondent-Appellant.

Clerk's Certificate

448 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—*against*—

UNITED STATES OF AMERICA,
449 *ex rel.*, WILLIAM FRAD,

Relator-Appellee.

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, do certify that the foregoing is a true Transcript of the Record of said *District Court in* the above entitled matter as agreed upon by the parties.

IN WITNESS WHEREOF I have caused the
450 seal of the said District Court to be hereunto affixed at the City of New York in the Southern District of New York this day of February in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States the one hundred and sixty-first.

CHARLES WEISER,
Clerk of the District Court of United States for the Southern District of New York.

[fol. 151] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. KELLY, United States Marshal for the Southern District of New York, Respondent-Appellant,

against

UNITED STATES OF AMERICA ex Rel. WILLIAM FRAD, Relator-Appellee

Before Manton, Swan and A. N. Hand, Circuit Judges

Appeal from the District Court for the Southern District of New York

The orders entered sustained a writ of habeas corpus sued out by William Frad and denied a motion to sentence the appellee. John J. Kelly, United States Marshal for the Southern District of New York, appeals. Reversed.

Lamar Hardy, United States Attorney, Attorney for Appellant. Curtis C. Shears, Asst. U. S. Attorney; Frank H. Gordon, Special Assistant to the U. S. Attorney, of Counsel.

Harris Jay Griston, Louis Karasik, Attorneys for Appellee.

MANTON, Circuit Judge:

March 26, 1934 appellee simultaneously entered a plea of guilty to three indictments. Indictment C-96-116 charged a conspiracy to violate §§220, 221, Title 18 U. S. Code [18 U. S. C. A. §88] and appellee was sentenced to two years imprisonment and to pay a $1,000. fine for which he was to stand committed until paid; indictment C-80-944 charged in five counts the use of passports obtained by false state-[fol. 152] ments as to identity (§§220, 221, Title 18, U. S. Code); and indictment C-96-120 in four counts charged impersonation by representing himself to be another person when entering the United States (§220, Title 8, U. S. Code).

On these last two indictments, the imposition of sentence was suspended and the appellee was placed on probation for a period of four years to begin after he had served the sentence of two years imposed on the first indictment.

November 2, 1935, appellee was discharged from prison and on November 13, 1935 entered his term of probation by signing the standing orders of the court as to probation which required him to report weekly to the probation officer. December 13, 1935, the judge who sentenced him while holding a criminal term in the Southern District of New York, having returned to his home district, the Eastern District of New York, held court on appellee's application for a discharge of probation, at his chambers in the Eastern District of New York, and later signed an order with the venue laid and the order to be entered in the Southern District of New York, reading:

"Ordered, that the order of probation made herein on the 26th of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this case be, and the same are hereby terminated."

[fol. 153] On a complaint made against appellee, for larceny on the high seas, an order was signed, November 20, 1936, for the issuance of a warrant to apprehend the probationer for violation of one of the terms of his probation. He was arrested and bailed pending a hearing. Though previously uninformed of the order revoking probation, the United States Attorney advised the appellee on December 2, 1936 that an application would be made to the sentencing judge, again holding court in the Southern District of New York, to vacate his order of December 16, 1935 and that the indictments C-96-120 and C-80-944 would be on the calendar for sentence December 8, 1936. On December 4, 1936, appellee surrendered to the marshal and sued out a writ of habeas corpus. A motion was noticed to commit appellee December 28, 1936. This was consolidated with the argument on the writ. The writ was sustained and the appellee discharged.

The probation Act (§§724, 725, Title 18 U. S. C.) grants a district judge power after conviction of a crime, to suspend the imposition and execution of sentence and place a defendant upon probation. It also provides powers of revocation or modification of the probation and sets forth the duties of the probationer. Such suspension might be

granted on a plea of guilty to the crimes here charged. Section 725 provides:

"When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation as shall seem advisable • • •."

[fol. 154] At any time within the probation period, the probationer may be arrested without a warrant or the court granting probation may issue a warrant for his arrest. This must be served by the probation officer or the United States Marshal, either in the district in which the probationer was put upon probation or in any district in which he is found. The court may then sentence him if reason appears and may revoke the probation or suspension of sentence and may impose any sentence which might orginally have been imposed.

Here the three indictments were separate charges of crime. They were not consolidated for trial. The pleas of guilty were separately received although involving crimes in transactions connected together by the same purpose and motive. U. S. v. Greenhaus, 85 Fed. 2,116 (C. C. A. 2), cert. denied November 17, 1936, held that where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at the termination of a prior one is unlawful and hence an order of probation is invalid and execution of the sentence may be ordered. That rule does not apply to indictments which are separate and not consolidated. Of course, even if it did apply it follows that the suspension could be vacated and execution of the sentennce ordered. In Miller v. Aderholt, 288 U. S. 206, the petitioner was given a suspended sentence and was discharged from custody. He was later arrested and sentenced by another judge. The court held the suspension of sentence for an indefinite period was a void sentence. The cause was held to properly continue on the docket, and "the jurisdiction of the trial court under circumstances such as are here disclosed is not exhausted until sentence [fol. 155] is pronounced either at the same or a succeeding term."

In U. S. ex rel Campbell v. Bishop, 47 Fed. 2, 95 (CCA. 5), the prisoner, on a plea of guilty, was sentenced to a

fine of $500 and to serve two years confinement with a conditional suspension of the imprisonment if and when the fine was paid. He paid his fine and was released but later arrested for violation of his probation. His probation was revoked, after a hearing, and he was committed for the original two years. It was held that the sentence was unlawful for it was beyond the authority of the court to indefinitely suspend sentences; but it was further held that the district court might eliminate the suspension of sentence and order the commitment of the petitioner.

"But in such cases there need not be any failure of justice; for, where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected." In re Bonner, 151 U. S. 242, 259.

The district judge sitting in the Eastern District of New York was attempting to exercise the power of a court in a cause pending in the Southern District. He had no power to revoke the order of probation and terminate the proceedings against the appellee. The Probation Act (§§ 724, 725, 18 U. S. C. A.) provides for the execution of its provisions by the court in which a defendant pleads guilty or is convicted. Ackerson v. U. S., 15 Fed. 2, 268 (C. C. A. 2)

It was twenty months after the sentencing judge's service in the Southern District was completed when he assumed jurisdiction to act as a court for the Southern District [fol. 156] while sitting in the Eastern District. Neither the United States Attorney for the Southern District (§§ 481-485, Title 28 U. S. C.) nor the Probation Officer for the Southern District (§§ 726-729, Title 18, U. S. C.) had any jurisdiction to act for the United States in the Eastern District of New York. A District Judge, ordered by the senior Circuit Judge, to hold court in a district other than his own is not thereby empowered to sign and enter orders in a case pending in such other district when absent therefrom and in his own district. cf. Escoe v. Zerbst, 295 U. S. 490; Riggs v. U. S., 14 Fed. 2, 5 (C. C. A. 4), cert. den. 273 U. S. 719. The order of the sentencing judge purporting to terminate the appellee's probation was void because of lack of jurisdiction. When he entertained

the application and decided it, he was not sitting at that time as a judge of the court of the Southern District.

The appellee, therefore, was subject to sentence if he violated the terms of his probation which had not expired or terminated. The statute expressly grants power to lengthen or end the probation supervision (§ 725). It is clear that the court may terminate probationary supervision, and the defendant may be brought before the court under a warrant issued and may be sentenced to any period which might originally have been imposed. Kaplan v. Hecht, 24 Fed. 2, 664 (C. C. A. 2). An order terminating the probationary supervision merely terminates the power of supervision of the probation officer but not that of the courts. Crowder v. Aderhold, 46 Fed. 2, 357 (D. Ga.). In Burns v. United States, 287 U. S. 216, the court affirmed an order revoking probation on one count of the indictment while the defendant was serving a sentence in jail on [fol. 157] another count. The court held that while in jail he was subject to the conditions of the probation.

There were separate indictments here and the court could sentence to imprisonment for one and suspend as to the others placing the prisoner on probation to commence during or after the period of incarceration provided it took effect at a fixed time without an indefinte condition. Miller v. Aderholt, supra.

The appellee is charged with a violation of his parole and the appellant has properly moved in the Southern District to revoke the probation and sentence him upon the second and third indictments. Burns v. U. S., supra; cf. Escoe v. Zerbst, supra.

The orders are reversed and the prisoner remanded for the consideration of the revocation of his probation and for sentence if warranted.

Orders reversed.

[fol. 158] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of May, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES ex rel. WILLIAM FRAD, *Relator*-Appellee,

vs.

JOHN J. KELLY, United States Marshal, etc., Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 159] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. William Frad vs. John J. Kelly, U. S. Marshal, etc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 17, 1937. William Parkin, Clerk.

[fol. 160] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 159, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. William Frad, Relator-Appellee, against John J. Kelly, United States Marshal, etc., Respondent-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-second day of May, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is *further ordered* that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 27 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

MAY TERM, 1937

No. [redacted] 87

WILLIAM D. FRAD,

Petitioner,

against

JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WILLIAM D. FRAD,
By Louis Karasik
and Harris Jay Griston,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States,

MAY TERM, 1937.

WILLIAM D. FRAD, *Petitioner,* against JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA.	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

May it please the Court:

The petitioner, William D. Frad, by Harris Jay Griston and Louis Karasik, his attorneys, prays for a Writ of Certiorari, to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, decided May 10, 1937, which

1. Reversed an order of the District Court of the Southern District of New York, which sustained a Writ of Habeas Corpus sued out by William Frad.

2. Reversed an order of the District Court, of the Southern District of New York, which denied the Government's motion for an order committing the above named defendant William Frad.

Opinions Below.

The District Court opinion (R. 129), is unreported. The Circuit Court of Appeals opinion has not yet been reported, but is annexed hereto in Appendix B, (*post*, p. 31).

Jurisdiction.

The jurisdiction of this Court is invoked under *Section 240 (a)* of the *Judiciary Code*, as amended by the Act of February 13, 1925 *(43 Stat. 938)*. The order for mandate of the Circuit Court of Appeals was entered May 17, 1937.

Statutes and Rules Involved.

The Statutes involved are *Title 18, U. S. Code, Sections 557, 724-726* (the Probation Act) and *Title 28, U. S. Code, Sections 22, 23, 481-485.*

Summary Statement of Matter Involved.

On March 21, 1934, the appellee, William D. Frad, came on for trial before Hon. Robert A. Inch, District Judge, and a jury, under three indictments, namely C 96-120, C 96-116 and C 80-944.

Before a jury was selected, he pleaded guilty to all three indictments. Sentence was deferred until the 26th of March, 1934.

Hon. Robert A. Inch is a District Judge of the Eastern District of New York, who had been temporarily assigned to the Southern District of New York for the March 1934 Term, after the termination of which term he returned to his home district.

The indictments were as follows:

Indictments C 96-116, charged him with conspiracy to violate Sections 211, 220 and 227, Title 22 U. S. Code under Section C 88 Title 18 U. S. Code (R. 9-14).

Indictment C 80-944, charged him in five counts with using passports obtained by false statements as to his identity (Sections 220, 221, Title 18, U. S. Code), (R. 4-8).

Indictment C 96-120, charged him in four counts with impersonation, by representing himself to be another person

when entering the United States (Section 220, Title 8, U. S. Code), (R. 15-20).

Under the first indictment, he was sentenced to two years imprisonment, and ordered to pay a $1,000 fine, for which he was to stand committed until paid (R. 14).

Under the last two indictments, the imposition of sentence was suspended, and the appellee was placed on probation for a period of four years, to begin after he had served the sentence of two years imposed under indictment C 96-116. (R. 8 and 19).

The appellee paid the fine of $1,000, and he was also committed to the Lewisburg Penitentiary, where he served his full sentence, with allowance off for good behavior, after which, he was discharged on November 2, 1935 (R. 68, 120).

The appellee then entered his term of probation under the other two indictments, and on November 15, 1935 signed the standing orders of the court as to probation (R. 25).

Subsequently, on December 13, 1935, an application was made to Judge Inch, the sentencing Judge, who was now sitting in his home District, in the Eastern District of New York, for an order discharging the appellee from probation, and terminating the proceedings against him, in accordance with the provision of the Probation Act, *Title 18; U. S. Code, Section 725.* Three days notice of that application was given to Hon. Fred E. Sweet, the Probation Officer of the Southern District of New York (R. 120, 83, 51, 29).

The hearing on that application was heard by Judge Inch in his Chambers in the Eastern District of New York (R. 51, 82, 83). At that hearing Probation Officer Sweet appeared, and opposed the motion *on the merits* (R. 51, 83).

After hearing argument of both sides, Judge Inch stated that the sentence which he had imposed on the first indictment on the plea of guilty was "quite stiff" (R. 91), and that for that reason he had not imposed any sentence on the other two indictments, but had deliberately suspended the imposition of sentence thereon (R. 57-58). He further stated, that, in view of the fact that the fine under that first indictment had been paid and the sentence thereunder

served, and in further view of the fact that medical proof submitted, both by doctors' statements and prison records, showed that the appellee was suffering from serious heart trouble, he would grant the motion.

Subsequently, on December 16, 1935, an order was signed by him providing as follows (R. 29):

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged rfom further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

That order was captioned (R. 28):

"UNITED STATES DISTRICT COURT

Southern District of New York."

Furthermore, that order, so captioned, was entered in the Southern District of New York, was filed in the Southern District of New York, and is still on file in the Southern District of New York; all as required by law (R. 107).

Subsequently, on a petition made against appellee by Probation Officer Sweet (R. 33), based on a complaint against appellee, filed by a special investigator, charging defendant with alleged larceny on the high seas (R. 30), an order was signed by Judge Caffey of the Southern District of New York, under date of November 20, 1936, for the issuance of a warrant to apprehend the appellee for alleged violation of one of the terms of his probation (R. 32). He was arrested and bailed pending a hearing. *The petition failed to mention Judge Inch's order of December 16, 1935,* even though Probation Officer Sweet knew about it, having opposed the granting of that order. Judge Caffey does not appear to have had any knowledge of the December 16th order, when he granted his order for a warrant.

On December 1, 1936, a motion was made by the District Attorney of the Southern District of New York returnable December 8, 1936, for an order to re-settle the order of Judge Inch dated December 16, 1935.

It is to be observed that, though the notice of motion states that the motion is for an order "to set aside" (R. 35) the December 16th order of Judge Inch, that phrase must be read together with the prayer for relief in the motion itself, which merely asks for *a re-settlement and modification* of that order, and

> "that so much of the order of December 16, 1935 that purports to do more than discharge the defendant from probation supervision be set aside and a new order entered in this cause" (R. 39).

On the hearing of that motion, the District Attorney specifically moved *to re-settle* the order, and did *not* seek to have it vacated (R. 59).

That motion was heard by Judge Inch, the sentencing Judge, who then again sat and held court in the Southern District of New York (R. 42). He decided, after hearing both sides *on the merits,* that he would grant *a re-settlement* of the order, so as to insert the word "probation" into that part of the order which reads:

> "* * * and the proceedings against him under this cause, be and the same hereby are terminated",

so that it would read,

> "* * * and the *probation* proceedings against him under this cause, be and the same hereby are teminated" (R. 65).

The defendant (petitioner herein) took the position then, that the order could not be re-settled at this late date. Thereupon the District Attorney stated that he would "hold up the entering of the order" of resettlement, "until such time as we find it necessary" (R. 65), and not to do so, anyhow, until after the court had disposed of the Writ of Habeas Corpus (R. 63).

So that the validity of Judge Inch's order of December 16, 1935, as an order in this proceeding, was recognized by the District Attorney of the Southern District of New York.

No order of resettlement was ever entered, so that the rights of the defendant on the Writ of Habeas Corpus, subsequently sued out by defendant, must be decided by the order as it stands of record, entered and on file with the Clerk of the Southern District of New York.

On or about the 3rd of December, 1936, the Government gave notice to the defendant, and to his surety, that the indictments against him under C 96-120 and C 80-944 would be brought on for sentence on December 8, 1936 (R. 40, 41). But that notice was not pressed, and no application to sentence was ever made.

Then, on December 4, 1936, the defendant surrendered to the Marshall, under the order of Judge Caffey of November 20, 1936, charging the defendant with probation violation, and sued out a Writ of Habeas Corpus (R. 73), *on the ground that he could not be guilty of any probation violation, in view of Judge Inch's order of December 16, 1935, which had discharged him from probation, and which had also "terminated" "the proceedings" against him* (R. 66-71). The return to that Writ was filed by John J. Kelly, Probation Officer, under date of December 8, 1936. A traverse to the return was filed by the defendant under date of December 10, 1936. Argument on the Writ came on before Judge Bondy on December 21, 1936 (R. 80).

The next day, the 22nd of December 1936, the United States Attorney served a notice of motion, returnable December 28, 1936, wherein he made the following prayer for relief, in regard to indictments C 96-120 and C 80-944 (R. 121).

> "WHEREFORE, deponent prays that an order issue committing this defendant for the period of the *unserved portion* of his sentence of March 26, 1934, *to wit, four years* in a place to be designated by the Attorney General of the United States, and for such other, further and different relief as to the court may seem just and proper." (Italics ours.)

With regard to this motion to commit, it should be observed that *there had been no sentence imposed on these two indictments*, but that, on the contrary, *"the imposition* of sentence" had been suspended. So that no motion for an order to designate a place of incarceration for the purported *"unserved* portion of his sentence of March 26, 1934, to wit, four years," would lie, and that motion was properly denied by the District Court (R. 132). *That is one of the orders involved on this appeal.*

In regard to the Writ of Habeas Corpus, the District Court held that, under *Title 18, U. S. C. Section 725,* the court could discharge the probationer not merely from further supervision, but could also terminate the proceedings against him in their entirety and give the defendant a full and complete discharge. Under that law, the order of Judge Inch of December 16, 1935 completely discharged the defendant, so that he was no longer amenable to any supervisory process of the courts in relation to those two indictments.

The District Court further held that, if the principle of *U. S.* v. *Greenhaus,* 85 Fed. 2, 116 (C. C. A. 2) applied to this case, (on the ground that the sentences on all three indictments could be considered a single sentence, as they were heard and disposed of simultaneously, and that therefore the suspension of imposition of sentence and granting of (probation on the last two indictments was illegal, in that it was coupled with a sentence for a prison term), the illegal provisions may be treated as a nullity. The District Court further held that no new sentence could now be imposed, as the term of court, within which to resentence, had long expired, because a valid sentence was imposed with reference to all indictments, in that a valid sentence was imposed as to the first indictment, which sentence had been served and the fine paid by the defendant. In other words, if all three indictments are to be deemed a consolidated indictment, only one sentence could be imposed, and no re-sentence could be given after the sentence imposed had been served, and fine paid, even though part of the sentence then given may have been void.

The District Judge, thereupon, held that the Government's motion to revoke the defendant's suspension of imposition of sentence, on the ground of violation of probation, should be denied, and it sustained the Writ of Habeas Corpus (R. 134. *That is the other order involved on this appeal.*

The Government appealed from those two orders, both of which were reversed by the Circuit Court of Appeals.

The Circuit Court of Appeals ruled that if the principle of the *Greenhaus* case applied, "the suspension (of sentence on the two indictments) could be vacated and execution of the sentence ordered". As has already been observed, however, *no sentence was imposed* on either of the two indictments in question. So that *no execution* of sentence was suspended, but the *imposition* of sentence itself had been suspended. Therefore, if the suspension of imposition of sentence was void, and the *Greenhaus* case principle applies, (in that all three indictments are to be deemed consolidated into one), there is *not* any valid portion of the sentence open on which execution could be ordered.

On the other hand, if the principle of the *Greenhaus* case does not apply, then the suspension of imposition of sentence thereon and the granting of probation was proper, because each of the three indictments was then on a separate footing, and each was entitled to a separate disposition. In that event, the subsequently granted order of Judge Inch of December 16, 1935, which was in accordance with *Section 725,* resulted in a full discharge of the defendant, as if he had served a sentence.

But the Circuit Court of Appeals held that the December 16th, 1935 order of the sentencing Judge, did not have such effect for two reasons.

First, the Circuit Court of Appeals held, that order was void because of lack of jurisdiction in Judge Inch to grant that order after he had returned to his home district.

But the Eastern District Judge, who had heard the proceeding in the Southern District as a duly assigned Judge, and who had suspended the imposition of sentence on those

two indictments, and granted probation thereon, would appear to have had continuing power in regard to probation. This is a dual power he has, namely (a) under *Section 22* of the Judiciary Code, and (b) under the very nature of probation itself, which is a continuing matter.

Furthermore, he had the power to pass upon the application to terminate the probation and the proceedings, even though he was then sitting in the Eastern District, because *Section 725* does *not* specify the court or Judge who may pass upon that application (except in one specific instance, not here involved), and leaves it open, so that the circumstances can shape their own remedy, and tribunal.

What is more, the application for such relief under probation may be granted in Chambers, for all proceedings in probation may be, and should be informal, and a Chambers hearing need not be in the original district.

It may be true that the sentencing Judge was not, on December 13, 1935, sitting as a judge of the Court of the Southern District in the Southern District of New York, but he was a Judge of the Court, and was sitting in Chambers in the Eastern District, and passing on this matter which pertained to the Southern District, upon the tacit consent of the Probation Officer of the Southern District. His order is therefore good.

If, however, there was any venue question, it may be waived, and was waived by the Government on two occasions. The application for the December 16th order was opposed by the Probation Officer of the Southern District, *on the merits*, without raising any question of venue. An order was properly made, after argument, properly captioned, properly entered, and properly filed *in the Southern District*, and no application to vacate was pressed, and no appeal was taken from that order. Furthermore, its validity was recognized by the District Attorney of the Southern District of New York on his application for re-settlement of that very order, especially when he said he would let that order stand until after the Habeas Corpus application was disposed of.

So that the Circuit Court of Appeals was in error in holding that this order of December 16th was void for lack of jurisdiction.

Secondly, the Circuit Court of Appeals held that, in any event, even if the order were valid, an order terminating the probationary supervision merely terminates the power of supervision over the defendant exercised by the Probation Officer, but not the general supervisory power of the Courts over him granted to the courts by *Section 725,* until the longest term for which the defendant could be sentenced has expired. This may be the limited effect of an order which merely discharges the defendant from probationary supervision, but the order here went further, and did not merely terminate the probationary supervision of the Probation Officer, but it also "terminated " *the proceedings*," as is expressly allowed by *Section 725.* This terminated everything, and constituted a full discharge of the defendant.

Therefore, Judge Caffey's order for a warrant charging the defendant with alleged violation of probation under those two indictments was improperly granted in that there was no proceeding against him then open, in which probation could be violated by him, and the Writ of Habeas Corpus was correctly sustained in the District Court, and was erroneously reversed by the Circuit Court of Appeals.

The principal questions presented, therefore, are as follows:

1. Under U. S. Code, Title 18, Section 725, may either a court or Judge terminate the proceedings against the defendant, so as to thereafter relieve him of not merely supervisory probation, but from every and all possible forms of probation or sentence, and fully discharge him, as if he had fully performed under a sentence?

2. Can any court or Judge grant that relief, regardless of whether he sits in the District where the case was tried, or in another district?

3. Does the Judge, who sat on the case, and imposed the probation and suspended the imposition of sentence, have continuing power to pass on the question of whether the defendant should be fully discharged?

4. Where a visiting Judge has heard the case and imposed the probation and suspended the imposition of sentence, may he thereafter, subsequent to the termination of the term, entertain a motion to discharge the defendant and grant such application?

5. May the question of venue, as to whether a former visiting Judge, now in his home district, may hear the motion to dicharge the defendant, be waived by the Government?

6. Where three indictments are brought on for trial on the same date, and the defendant pleads guilty to all three indictments, may the court impose a term of two years and $1,000 fine on one indictment and at the same time suspend the imposition of sentence under each of the other indictments, and grant probation for four years to begin after serving the sentence on the first indictment?

7. Where a visiting Judge from the Eastern District of New York, while sitting in the Southern District of New York hears three criminal cases in which defendant pleaded guilty, imposes sentence in one and grants probation, and suspends the imposition of sentence on the other two, and returns to his home district, and where thereafter a motion is made returnable before that Judge in his home district, upon notice duly given to the Probation Officer of the Southern District, and where that Probation Officer appears before the Judge on the return date at Chambers and opposed the said motion, and where the said Judge after deliberation grants the motion discharging the defendant, and where thereafter an order is signed by said Judge, sitting in his Chambers in the Eastern District, captioned in the Southern District, and thereafter a motion is made by the District Attorney of the Southern District to modify said order, and said motion is argued in the Southern District of New York before the sentencing judge, who is again sitting there, and is argued on the merits and granted, but no order is entered and the District Attorney says he will let the order stand until he decides to avail himself of the privilege granted to re-settle, is the defendant amenable in those proceedings to further control by the court, for alleged acts of violation of probation occurring subsequent to the date of the entry of the discharge order?

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that if the three indictments here, to which the defendant pleaded guilty at the same time could be treated as if they were several counts in a single consolidated indictment, that the suspension of the imposition of sentence on two of the three indictments could be vacated and execution of sentence ordered, even though the sentence on the third indictment had been served.

2. The Circuit Court of Appeals erred in holding that the Probation Act, Sections 724, 725, Title 18 U. S. C. provides for the execution of its provisions solely by the court in which the defendant pleads guilty or is convicted.

3. The Circuit Court of Appeals erred in holding that neither the United States Attorney for the Southern District, nor the Probation Officer of the Southern District, had any jurisdiction to act for the United States in the Eastern District of New York, in regard to *Sections 724* and *725* of *Title 18 U. S. C.*

4. The Circuit Court of Appeals erred in holding that a District Judge, ordered by a senior Circuit Court Judge to hold court in another district, is not empowered to sign an order in a case pending in such other district, when absent therefrom and sitting in another district.

5. The Circuit Court of Appeals erred in holding that the order of the sentencing Judge, which terminated the appellee's probation and terminated the proceedings against the appellee, was void for lack of jurisdiction, because granted by him at Chambers when he was back in his home district after his visiting term was over.

6. The Circuit Court of Appeals erred in holding that the sentencing Judge, who had been a visiting Judge at the time

of sentence, and who was sitting in his home district when he entertained the application and decided the matter pertaining to probation which he had imposed, had no jurisdiction to pass upon that application.

7. The Circuit Court of Appeals erred in holding that the Government properly moved to revoke the probation and to sentence the appellee upon the second and third indictments, even though an order had been entered prior thereto terminating the proceedings against him.

8. The Circuit Court of Appeals erred in reversing the order entered in the District Court, which denied the Government's motion for an order committing the appellee to a penitentiary to be designated by the Attorney General of the United States, wherein the defendant should serve an "unserved portion" of a four year sentence under indictments C 96-120 and C 80-944.

9. The Circuit Court of Appeals erred in reversing an order of the District Court, which sustained a Writ of Habeas Corpus, granted to the appellee, who had theretofore been arrested under a warrant issued pursuant to an order of arrest of the appellee, for alleged violation of the terms of his probation.

10. The Circuit Court of Appeals erred in holding that under *Section 725*, the appellee could not be fully discharged and the proceedings against him fully terminated.

Reasons Relied on for Granting the Writ.

A.

The Circuit Court of Appeals, in holding that under *Section 725* of the *Probation Law*, a court may not, by order, terminate the proceedings against a defendant and fully discharge him, has decided an important question of Federal Criminal Law and procedure in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit.

Under *Section 725*, two types of probation are created, namely (a) *sentence probation* under which the defendant is subject to probate supervision by Probation Officers during the time fixed by the sentencing judge for probation, when the imposition of sentence itself is suspended, or execution is suspended on a sentence imposed, and (b) *statutory probation* under which the court has power, *after* sentence probation is ended, but within the maximum period for which the defendant might originally have been sentenced, to have him brought in and to then impose such sentence as might originally have been imposed upon the defendant.

That section further gives the court the power to have the probationer brought in at any time while he is on probation, to investigate the facts of his probation and then the section says:

> "* * * The court may thereupon discharge the probationer from further supervision *and may terminate the proceedings against him*, or may extend the probation, as shall seem advisable."

In the decision appealed from, the Circuit Court of Appeals for the second circuit has held that the Language of *Section 725*, which permits the court "to terminate the proceedings against" the defendant, does not give power to fully discharge the defendant, but merely to terminate the sentence probation, namely the supervisory probation by Probation Officers.

The contrary, however, has been held by the Circuit Court of Appeals for the Fifth Circuit in *U. S.* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5, 1932). The court there made a lengthy and careful study *of Section 725*, pointed out that the Probation Act was remedial, and then made this significant observation (p. 172):

> "* * *the law is designed to vest the *trial judges* with discretion * * * the act gives the trial court authority to suspend either the imposition or execution of sentence and to place the defendant upon probation upon conditions. If in a shorter time than provided by the order, it should appear that the defendant has rehabilitated himself and become a useful citizen, *the court may terminate its proceedings against him.*" (Italics ours.)

Then comes a further even more significant, part of the opinion, for the court then says (p. 172):

> "Suspension of sentence * * * implies that the jurisdiction of the court over the case and over the defendant is continued until the suspension of sentence is terminated, either by the *final discharge* of the defendant or by the imposition of sentence." (Italics ours.)

That principle has been squarely applied and a full discharge granted in *United States* v. *Maisel*, 26 F. (2) 275 (D. C., S. D., Texas, 1928), which case has been discussed with approval in *23 Illinois Law Review 832* and *7 Texas Law Review 161.*

The point does not appear to have been passed upon by this court.

B.

The Circuit Court of Appeals, in holding that the Probation Act, *Sections 724, 725, 18 U. S. C.* provides for the execution of its provisions solely by the Court in which the defendant pleads guilty, or is convicted, and by no other Court or Judge, has decided an important question of Federal Criminal Law and procedure, which has not been, but should be, settled by this Court, and which holding is probably in conflict with an applicable decision of this Court.

Section 725 has two distinct sets of provisions relating to two distinct types of judicial acts, to be performed: (a) provisions giving the court power to *discharge* the probationer from further probation supervision and to *'terminate* the proceedings against him" or to extend the probation, and (b) provisions giving the court power to *revoke* probation and to *revoke* the suspension of sentence and to impose such sentence as might originally have been imposed.

The section does *not* designate the court which may hear the application relating to *discharge* of the probationer and *termination* of the proceedings. *That has been left open.*

In regard to revocation, however, the section makes a distinction between probationers who are arrested by warrant for probation violation, and those who are arrested without a warrant, and specifies that probation violators, *who are arrested by warrant,* should be taken before the court which issued the warrant, and still further provides that the warrant is to be issued only out of the sentencing court (*Escoe* v. *Zerbst,* 295 U. S. 490). The section, however, does *not* specify the court to which a probation violator shall be taken, when he has been arrested *without a warrant,* though it does provide that he may be arrested without a warrant *"wherever found".*

It is, therefor, significant to observe, that the specific court that may hear the application has been named only for one set of circumstances, and has been left open as to

all other provisions in the section. This flexibility of the section, as to all other provisions thereunder, has been recognized by the Circuit Court of Appeals for the Second Circuit itself.

In *Ackerson* v. *U. S.* 15 F. (2) 268 (C. C. A. 2, 1926), the court said per *Hough, J.* (p. 270):

> "* * * there is nothing specifically said in the statute (referring to Section 724 and 725 of Title 18, U. S. C.) to prevent a convict from selecting some particular judge before whom to prefer his appeal for mercy * * * and much less does the statute in terms cover cases (such as are shown above) of death or *removal* (of the trial judge) *from district.*" (Italics ours.)

In *Burns* v. *U. S.*, 287 U. S. 216, this court said (p. 220):

> "To accomplish the purpose of the statute, an *exceptional degree of flexibility in administration is essential. It is necessary to individualize each case,* to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." (Italics ours.)

See also

> *U. S.* v. *Maisel,* 26 F. (2) 275 (D. C. S. D. Texas 1928).

In the *Ackerson* case the question presented was whether a District Judge had the power to entertain an application to terminate probation supervision and the court held he did. It did not then decide that a visiting Judge who had tried the case and who had left the District did not also have such power.

It would appear that the section was loosely framed by design, in order to let the facts of each case shape their own remedy and to permit the most available and most desirable court pass upon the question of probation, depending up the place where the probationer is at the time that the problem is presented.

The Trial Judge appears to be the most desirable person to pass upon such applications, in view of his contact with the case itself.

U. S. v. *Antinori,* 59 Fed. (2d) 171 (C. C. A. 5, 1932).

In *Jianole* v. *U. S.,* 58 F. (2) 115 (C. C. A. 8, 1932), the court said, per *Van Valkenburgh, Ch. J.* (p. 117):

> "Everything points to the purpose of the Congress to lodge a very broad discretion in the *trial judge* in the granting *and revoking* of probation. To require formal proceedings would be subversive of the very purpose of the act." (Italics ours.)

In *Rosenwinkel* v. *Hall,* 61 F. (2) 724, (C. C. A. 7, 1932), the court said (p. 726):

> "Its object being human and benevolent, the statute (the Probation Act) should be given a broad interpretation."

In *Riggs* v. *U. S.,* 14 F. (2) 5, (C. C. A. 4, 1926) Certiorari denied 273 U. S. 719, the court said, per *Waddill, J.* (p. 9):

> "In the enforcement of this action much latitude must be allowed to the district judges, in affording the defendant the benefits thereof. Hence the ordinary rules regarding terms of court, cannot be adhered to strictly."

C.

The Circuit Court of Appeals, in holding that the visiting Judge, who had heard the case and imposed the probation, had no power and authority thereafter, by order made in chambers out of the district, to terminate the proceedings against the defendant, has decided an important question of Federal Criminal Law and procedure, which has not been and should be settled by this Court.

As probation is informal, orders effecting it may properly be made at Chambers. So that the order here, made at Chambers, though out of the District, is a valid order.

In re Parker, 131 U. S. 221;
U. S. v. *Goldstein*, 271 F. 838 (C. C. A. 8, 1931);
Jianole v. *U. S.*, 58 F. (2) 115 (C. C. A. 8, 1932);
Apgar v. *U. S.*, 255 F. 16.

In the *Apgar* case, *supra*, the court said (p. 18).

> "Where the order is one which may be made at the Chambers of the Judge, it is not necessary that it be within the territorial limits of the district where the order is to be effective, if it is made where the Judge at the time is performing the duties of his office."

Especially is this so under *Title 28, U. S. C., Section 22*, which gives a visiting Judge, after he has returned to his own District, "the power to decide *all matters* which have been submitted to him within such district". *Section 23* is supplemental to *Section 22*.

That the provisions of *Section 22* apply to visiting Judges is settled.

Hicks v. *U. S. Shipping Board*, 14 F. (2) 316 (1926).

Probation is, by its very nature, a continuing matter.

Burns v. *U. S.*, 287, U. S. 219 (1932);
U. S. v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5, 1932).

The probation proceeding, under the Probation Act, is something separate and apart from the criminal proceeding (See *U. S.* v. *Gargano*, 25 F. (2) 723, p. 724). Probation would appear to be a matter which was submitted to the trial judge at the time he imposed probation when the defendant came up for sentence. See *U. S.* v. *Maisel*, 59 F. (2) 172, and *Jianole* v. *U. S.*, 58 F. (2) 115 (C. C. A. 8, 1932).

It would appear to be the intent of Congress to permit the sentencing Judge to have power over the probationer even though another Judge may also have concurrent power. The

facts are permitted to shape their own remedy within the benevolent purpose of the Probation Act.

This court has held in *Escoe* v. *Zerbst,* 295 U. S. 490, that revocation of probation "is not a trial in any strict or formal sense" (p. 493).

In *Evans* v. *District Judge,* 12 F. (2) 64, p. 65 (C. C. A. 6, 1926), it was expressly said that probation matters should not be "the subject of formal applications, hearings and orders."

It has also been declared that the duties imposed by the Probation Act on a judge are *sui generis;* that his functioning as a judge or court in such a proceeding is as judge or court in name only; that the essence of his duties under the Probation Act may well have been vested in some "executive officer, board, bureau or commission"; and that the duties under the Probation Act must be distinguished from the judicial functions of the Judge or Court under the Criminal Statutes under which sentence is imposed. *U. S.* v. *Gargano,* 25 F. (2) 723, p. 724.

Indeed, it has been observed in the *Ackerson* case, *supra,* that the Probation Statute was so loosely framed, that even the nature of probation itself was left vague, saying (p. 269):

> "We do not express any opinion on the meaning or effect of the phrase 'place on probation'; but probation, whatever it means, is part of the jurisdictional grant."

D.

The Circuit Court of Appeals, in holding that an order properly captioned in the proper district, properly entered and properly filed, and unvacated and unappealed from, may be treated as a nullity, has decided a question of Federal Criminal Procedure in conflict with the Circuit Court of Appeals for the 10th and 8th Circuits.

In *Clarke* v. *Chicago B. & Q. Ry. Co.,* 62 F. (2) 440, 441 (C. C. A. 10th), where a visiting judge signed an order in an

action, after he had returned to his own district, which order was captioned and entered in the original district, it was contested for lack of jurisdiction of the judge, and the court held:

> "The presumption is that the order was regularly and legally made (The Alaska)."

To like effect see

U. S. vs *Goldstein*, 271 Fed. 838 (C. C. A. 8, 1931);
The Alaska, 35 F. 555 (C. C. S. D.);
Columbus Chain v. *Standard Chain Co.*, 145 F. 186.

E.

The Circuit Court of Appeals, in holding that the question of venue was not waived, as to the order which was entered terminating the proceedings against the Defendant, decided a question of Federal Criminal Procedure, probably in conflict with an applicable decision of this Court.

This court has held that the question of venue may be waived even to institute an action.

Panama Ry. Co. v. *Johnson*, 289 F. 964, Judg. Aff'd. 264 U. S. 375.

Under *Section 725*, the only person who needs to be notified about the application for discharge of defendant and termination of the proceedings is the proper probation officer. Here the probation officer for the Southern District of New York was notified, and he appeared on the hearing and opposed the application on the merits. Thereafter, the District Attorney for Southern District of New York moved for resettlement of that order, and that motion wase heard by the same judge, then again sitting in the Southern District and that motion was argued *on the merits*, and the validity of the order, as a

proper order, was accepted by the District Attorney, who said he would not even resettle the order, "until such time as we find it necessary".

As *Section 725 does not* specify the court that may hear *applications* for the *discharge* of the probation and for *termination* of proceedings against him, if any question of venue existed, it was waived first by the probation officer and next by the District Attorney.

F.

The Circuit Court of Appeals for the Second Circuit, in holding that the defendant may be now sentenced on two of three indictments on which a conditional probation was imposed, has decided an important question of Federal Criminal Law and procedure contrary to its own prior determination and that of the Circuit Court of the 10th Circuit.

The Circuit Court of Appeals is in error in distinguishing the instant case from *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2, 1936). In *United States* v. *Greenhaus, supra,* cert. den. November 17, 1936, the Circuit Court held that where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at termination of a prior one is unlawful, and hence an order of probation is invalid and execution of the sentence may be ordered. The opinion in the case at bar, decided May 10, 1937, held that "that rule does not apply to indictments which are separate and not consolidated", and the defendant was remanded for the consideration of the revocation of his probation and for sentence under the Probation Act (§725 Title 18 U. S. C.).

The distinction made between counts in a single indictment in *United States* v. *Greenhaus, supra,* and separate indictments in the instant case is not supported by the weight of authority. *Riggs* v. *United States,* 14 F. (2d) 5 (C. C. A. 4, 1926); *Freeman* v. *United States,* 227 Fed. 732, 740 (C. C. A. 2, 1915); *United States ex rel. Mignozzi* v. *Day,* 51

F. (2d) 1019 (C. C. A. 2, 1931); *Gillespie* v. *Walker*, 296 Fed. 330 (C. C. A. 4, 1924); Cf. *Vimmick* v. *Tompkins*, 194 U. S. 540; *In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372.

The three indictments here to which pleas of guilty were entered simultaneously arose out of the same series of transactions. They could have been consolidated under Section 557 of Title 18 U. S. C.

Under the second opinion of *United States* v. *Greenhaus*, decided April 20, 1937, the Court is limited to recommitting the defendant to serve the sentence originally imposed. In the case at bar no sentence had been imposed on March 26, 1934 on two of the indictments,* and a proper sentence of two years and a fine of $1,000. was imposed on C 96-16. Therefore, the complete sentence imposed on that date was served, and it is now too late for the government to say that sentence should be changed after it has exacted the full penalties thereon from the defendant.

Furthermore, the sentence cannot be changed after the term in which it has been imposed has expired. *Santos* v. *Esola*, 50 F. (2d) 516; *Gillespie* v. *Walker*, *supra*, *Ex parte Lang*, 18 Wall 163, 167 (1873).

This decision is in direct conflict with an opinion of the 10th Circuit; *White* v. *Burke*, 43 F. (2d) 329 (C. C. A. 10, 1930), which held that the District Court is without power to suspend a part of a sentence on the condition that defendant serve another part thereof.

WHEREFORE, the petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals

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* The difference in effect between the suspension of imposition of sentence and of suspension of execution on a sentence imposed is well settled, *United States* v. *Murray*, 275 U. S. 347; *Kriebel* v. *United States*, 10 F. (2d) 762; *United States* v. *Lecato*, 29 F. (2d) 694; 36 Op. Atty Gen., 189, 190; *State* v. *Liliopoulos*, 165 Wash. 197, 5 Pac. (2d) 319.

for the Second Circuit, commanding that Court to certify and to send to this court, for its review and determination on a day certain to be therein named, the full and complete transcript of the record and proceedings in the case entitled on its docket "UNITED STATES CIRCUIT COURT OF APPEALS, For the Second Circuit, JOHN J. KELLY, United States Marshal for the Southern District of New York, Respondent-Appellant, against UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD, Relator-Appellee," and that said orders of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and your petitioner may have such other, further and different relief in the premises as to this Honorable Court may seem meet, just and proper; and your petitioner will ever pray.

May 21, 1937.

WILLIAM D. FRAD,
By Louis Karasik
and Harris Jay Griston,
Attorneys for Petitioner.

APPENDIX A.

Title 28 U. S. C. *Judicial Code, Section 22,* provides as follows:

> "*Any designated and assigned judge* who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, *to decide all matters which have been submitted to him within such district,* to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation Mar. 3, 1911, c. 231 §18, 36 Stat. 1089; Oct. 3, 1913, c. 18, 38 Stat. 203; Sept. 14, 1922, c. 306; §5, 42 Stat. 839)." (Italics ours.)

Title 28 U. S. C. *Judicial Code, Section 23,* provides as follows:

> "*Same; duty of district or circuit judges.* It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 or this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district. (R. S. §595; March 3, 1911, c. 231, §19, 36 Stat. 1090.)"

Title 28, U. S. C. *Judicial Code Section 481-485, provides as follows:*

> Sec. 481. *District Attorneys*—There shall be appointed in each district, including the District of Columbia, a

person learned in the law, to act as attorney for the United States in such district. (R. S. Sec. 767; June 26, 1876, c. 147, Sec. 1, 4, 19 Stat. 61, 62; Feb. 24, 1879, c. 97, Sec. 8, 20 Stat. 320; Mar. 3, 1881, c. 144, Sec. 7, 21 Stat. 507; April 25, 1882, c. 87, Sec. 1, 3, 22 Stat. 47; July 20, 1882, c. 512, Sec. 3, 22 Stat. 172; Aug. 5, 1886, c. 928, Sec. 7, 24 Stat. 309; Feb. 22, 1889, c. 180, Sec. 21, 25 Stat. 682; July 3, 1890, c. 656, Sec. 16, 26 Stat. 217; July 10, 1890, c. 664, Sec. 16, 26 Stat. 225; Mar. 3, 1893, c. 220, 27 Stat. 745; July 16, 1894, c. 138, Sec. 14, 16, 28 Stat. 110, 111; June 24, 1898, c. 495, Sec. 1, 30 Stat. 487; May 12, 1900, c. 391, Sec. 9, 31 Stat. 176; Jan. 22, 1901, c. 105, Sec. 4, 7, 31 Stat. 736, 737; Feb. 12, 1901, c. 355, Sec. 5, 7, 31 Stat. 782; Mar. 2, 1901, c. 801, Sec. 3, 5, 31 Stat. 881; Mar. 11, 1902, c. 183, Sec. 5, 6, 32 Stat. 66; Mar. 2, 1905, c. 1305, Sec. 4, 6, 33 Stat. 824, Mar. 3, 1905, c. 1427, Sec. 13, 15, 19, 33 Stat. 995, 996; June 16, 1906, c. 3335, Sec. 13, 34 Stat. 275; Mar. 3, 1915, c. 100, Sec. 3, 4, 38 Stat. 961.)

Sec. 482. *Same; term and oath.*—District attorneys, including the District of Columbia, shall be appointed and commissioned for a term of four years, and shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. Every district attorney, before entering upon his office shall be sworn to a faithful execution thereof. (R. S. Sec. 769; June 24, 1898, c. 495, Sec. 1, 30 Stat. 487.)

Sec. 483. *Assistant district attorneys; official residence.*—Except as provided in section 591 of this title, whenever, in the opinion of the district judge of any district, including the District of Columbia, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed, by the Attorney General; but such opinion shall state to the Attorney General the facts as distinguished from conclusions, showing the necessity therefor (May 28, 1896, c. 252, Sec. 8, 29 Stat. 181; July 19, 1919, c. 24, Sec. 1, 41 Stat. 209.)

Sec. 484. *Clerical assistance; salaries*—Except as provided by section 591 of this title, the district attorney

of any judicial district, including the district attorney for the District of Columbia, when the facts showing the necessity therefor are certified by the district judge to the Attorney General, may with the approval of the Attorney General, and no longer than such approval lasts, employ necessary clerical assistance at such salary or salaries as shall be from time to time fixed by the Attorney General (May 28, 1896, c. 252, Sec. 15, 29 Stat. 183; July 19, 1919, c. 24 Sec. 1, 41 Stat. 209.)

Sec. 485. District attorneys; duties—It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury (R. S. Sec. 771).

Probation Act. (Act March 4, 1925, c. 521, as Amended June 6, 1930, c. 406 and June 16, 1933, c. 97; U. S. C. Title 18, Secs. 724-725).

Sec. 724: *Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation or modification of probation; duties of probationer.* The courts of the United States having original jurisdiction of criminal actions, except in the District Court of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or mod-

ify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

Sec. 725. *Same; powers of probation officers; arrest of probationer.* When directed by the court, the probation officer shall report to the court, with a statement of thec onduct of the probationer while on probation. The Court may thereupon discharge the probationer from further supervision and may terminate ment of the conduct of the probationer while on probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

Sec. 726. *Same; probation officers; appointment, etc.*—The judge of any United States court having orig-

inal jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the discretion of the judge making such appointment or of his successor. All such probation officers shall serve without compensation except that in case it shall appear to any such judge that the needs of the service require that there should be a salaried probation officer, such judge may appoint one such officer and shall fix the salary of such officer subject to the approval of the Attorney General in each case. Probation officers who are to receive salaries shall be appointed after competitive examination held in accordance with the laws and regulations of the civil service of the United States. Such judge may in his discretion remove any probation officer serving in his court. The appointment of probation officers shall be in writing and shall be entered on the records of the court of the judge making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed. Such court may allow any probation officer his actual expenses necessarily incurred in the performance of his duties. Such salary and expenses when duly approved shall be paid from the appropriations for courts in which such officer serves. (Mar. 4, 1925, c. 521, sec. 3, 43 Stat. 1260.)

Sec. 727. *Same; duties of probation officers.*—It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons

under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such report to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (Mar. 4, 1925, c. 521, Sec. 4, 43 Stat. 1260.)

Sec. 728. *Duties of Attorney General affecting Probation officers, investigations, collection of information, record, forms and statutes, rules, enforcement of laws, annual report.* The Attorney General or his authorized agent shall investigate the work of the Probation Officers and make recommendations concerning the same to the respective Judges and shall have access to the records of all Probation Officers. He shall collect for publication statistical and other information concerning the work of the Probation Officers. He shall prescribe record forms, and statistics to be kept by the Probation Officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the Probation Law in all U. S. Courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts. (March 4, 1925, Chap. 521, Sec. 4 as added June 6, 1930 Chap. 406, Sec. 2 also in 46 Stat. 502. See note to Section 726.)

Sec. 557. *Same; Joinder of charges.* When there are several charges against any person for the same act or transaction; for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in several counts and if two or more indictments are found in such case, the court may order them to be consolidated. Revised Statutes, Section 1024.

APPENDIX B.

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

JOHN J. KELLY, United States Marshal for the Southern District of New York,
Respondent-Appellant,

against

UNITED STATES OF AMERICA, *ex rel* WILLIAM FRAD,
Relator-Appellee.

BEFORE—MANTON, SWAN and A. N. HAND,
Circuit Judges.

Appeal from the District Court for the Southern District of New York. The orders entered sustained a writ of habeas *corpus* sued out by William Frad and denied a motion to sentence the appellee. John J. Kelly, United States Marshal for the Southern District of New York, appeals.

Reversed.

LAMAR HARDY, United States Attorney, Attorney for Appellant.

CURTIS C. SHEARS, Ass't U. S. Attorney,

FRANK H. GORDON, Special Assistant to the United States Attorney, of Counsel.

HARRIS JAY GRISTON, LOUIS KARASIK, Attorneys for Appellee.

MANTON, Circuit Judge.

March 26, 1934 appellee simultaneously entered a plea of guilty to three indictments. Indictment C 98-116 charged a conspiracy to violate §§220, 221, Title 18, U. S. Code (18 U. S. C. A. §88) and appellee was sentenced to two years imprisonment and to pay a $1,000. fine for which he was to stand committed until paid; indictment C 80-944 charged in five counts the use of passports obtained by false statements as to identity (§§220, 221, Title 18, U. S. Code); and indictment C 96-120 in four counts charged impersonation by representing himself to be another person when entering the United States (§220, Title 8, U. S. Code).

On these last two indictments, the imposition of sentence was suspended and the appellee was placed on probation for a period of four years to begin after he had served the sentence of two years imposed on the first indictment.

November 2, 1935, appellee was discharged from prison and on November 15, 1935 entered his term of probation by signing the standing orders of the court as to probation which required him to report weekly to the probation officer. December 13, 1935, the judge who sentenced him while holding a criminal term in the Southern District of New York, having returned to his home district, the Eastern District of New York, held court on appellee's application for a discharge of probation, at his chambers in the Eastern District of New York, and later signed an order with the venue laid and the order to be entered in the Southern District of New York, reading:

> "Ordered, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this case be, and the same are hereby terminated."

On a complaint made against appellee, for larceny on the high seas, an order was signed, November 20, 1936, for the issuance of a warrant to apprehend the probationer for viola-

tion of one of the terms of his probation. He was arrested and bailed pending a hearing. Though previously uninformed of the order revoking probation, the United States Attorney advised the appellee on December 2, 1936 that an application would be made to the sentencing judge, again holding court in the Southern District of New York, to vacate his order of December 16, 1935 and that the indictments C 96-120 and C 80-944 would be on the calendar for sentence December 8, 1936. On December 4, 1936, appellee surrendered to the marshal and sued out a writ of habeas corpus. A motion was noticed to commit appellee December 28, 1936. This was consolidated with the argument on the writ. The writ was sustained and the appellee discharged.

The Probation Act (§§724, 725, Title 18, U. S. C.) grants a district judge power after conviction of a crime, to suspend the imposition and execution of sentence and place a defendant upon probation. It also provides powers of revocation or modification of the probation and sets forth the duties of the probationer. Such suspension might be granted on a plea of guilty to the crimes here charged. Section 725 provides:

> "When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation as shall seem advisable * * *."

At any time within the probation period, the probationer may be arrested without a warrant or the court granting probation may issue a warrant for his arrest. This must be served by the probation officer or the United States Marshal, either in the district in which the probationer was put upon probation or in any district in which he is found. The court may then sentence him if reason appears and may revoke the probation or suspension of sentence and may impose any sentence which might originally have been imposed.

Here the three indictments were separate charges of crime. They were not consolidated for trial. The pleas of guilty were separately received although involving crimes in transactions connected together by the same purpose and motive. *U. S.* v. *Greenhaus,* 85 F. 2, 116 (C. C. A. 2), cert. denied November 17, 1936, held that where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at the termination of a prior one is unlawful and hence an order of probation is invalid and execution of the sentence may be ordered. That rule does not apply to indictments which are separate and not consolidated. Of course, even if it did apply it follows that the suspension could be vacated and execution of the sentence ordered. In *Miller* v. *Aderholt,* 288 U. S. 206, the petitioner was given a suspended sentence and was discharged from custody. He was later arrested and sentenced by another judge. The court held the suspension of sentence for an indefinite period was a void sentence. The cause was held to properly continue on the docket, and "the jurisdiction of the trial court under circumstances such as are here disclosed is not exhausted until sentence is pronounced either at the same or a succeeding term."

In *U. S. ex rel Campbell* v. *Bishop,* 47 Fed. 2, 95 (C. C. A. 5), the prisoner, on a plea of guilty, was sentenced to a fine of $500 and to serve two years confinement with a conditional suspension of the imprisonment if and when the fine was paid. He paid his fine and was released but later arrested for violation of his probation. His probation was revoked, after a hearing, and he was committed for the original two years. It was held that the sentence was unlawful for it was beyond the authority of the court to indefinitely suspend sentences; but it was further held that the district court might eliminate the suspension of sentence and order the commitment of the petitioner.

> "But in such cases there need not be any failure of justice. for, where the conviction is correct and the error

or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected." In re Bonner, 151 U. S. 242, 259.

The district Judge sitting in the Eastern District of New York was attempting to exercise the power of a court in a cause pending in the Southern District. He had no power to revoke the order of probation and terminate the proceedings against the appellee. The Probation Act (§§724, 725, 18 U. S. C. A.) provides for the execution of its provisions by the court in which a defendant pleads guilty or is convicted. *Ackerson* v. *U. S.*, 15 F. 2, 268 (C. C. A. 2).

It was twenty months after the sentencing judge's service in the Southern District was completed when the assumed jurisdiction to act as a court for the Southern District while sitting in the Eastern District. Neither the United States Attorney for the Southern District (§§481-485, Title 28 U. S. C.) nor the Probation Officer for the Southern District (§§726-729, Title 18, U. S. C.) had any jurisdiction to act for the United States in the Eastern District of New York. A District Judge, ordered by the senior Circuit Judge, to hold court in a district other than his own is not thereby empowered to sign and enter orders in a case pending in such other district when absent therefrom and in his own district. cf. *Escos* v. *Zerbst,* 295 U. S. 490; *Riggs* v. *U. S.*, 14 Fed. 2, 5 (C. C. A. 4), cert. den. 273 U. S. 719. The order of the sentencing judge purporting to terminate the appellee's probation was void because of lack of jurisdiction. When he entertained the application and decided it, he was not sitting at that time as a judge of the court of the Southern District.

The appellee, therefore, was subject to sentence if he violated the terms of his probation which had not expired or terminated. The statute expressly grants power to lengthen or end the probation supervision (§725). It is clear that the court may terminate probationary supervision, and the

defendant may be brought before the court under a warrant issued and may be sentenced to any period which might originally have been imposed. *Kaplan* v. *Hecht,* 24 Fed. 2, 664 (C. C. A. 2). An order terminating the probationary supervision merely terminates the power of supervision of the probation officer but not that of the courts. *Crowder* v. *Aderholt,* 46 Fed. 2, 357 (D. Ga.). *In Burns* v. *United States,* 287 U. S. 216, the court affirmed an order revoking probation on one count of the indictment while the defendant was serving a sentence in jail on another count. The court held that while in jail he was subject to the conditions of the probation.

There were separate indictments here and the court could sentence to imprisonment for one and suspend as to the others placing the prisoner on probation to commence during or after the period of incarceration provided it took effect at a fixed time without an indefinite condition. *Miller* v. *Aderholt, supra.*

The appellee is charged with a violation of his parole and the appellant has properly moved in the Southern District to revoke the probation and sentence him upon the second and third indictments. *Burns* v. *U. S., supra; cf. Escoe* v. *Zerbst, supra.*

The orders are reversed and the prisoner remanded for the consideration of the revocation of his probation and for sentence if warranted.

Orders reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 87

WILLIAM D. FRAD,
Relator-Appellant,

against

JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF WILLIAM D. FRAD, APPELLANT.

HARRIS JAY GRISTON, and
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Argument:

I. Under Section 725 of the Probation Law, an order may be made fully discharging the defendant and finally terminating the proceedings against him 15

II. Until sentence or discharge of the defendant, the Trial Judge's jurisdiction continues over him, even at a subsequent term, and even though the Trial Judge was a visiting judge who has, in the meantime, returned to his own district; particularly so under the provisions of the Probation Act. Judge Inch, therefor, had the power to make the order of December 16, 1935 25

III. The Probation Act did not designate the specific judge who should pass upon the application for discharge of the probationer or termination of the proceedings, but left it open. The Trial Judge is generally the preferable judge to pass upon such relief, even though a sitting judge of the court might also do so 34

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IV. Any venue objection that might have been raised to Judge Inch hearing the motion in his home district was waived by the Government on two occasions: (1) when the motion was originally argued on its merits (R. 50, 51, 83), and (2) when the Government moved to re-settle the order (R. 39) 40

V. The visiting District Judge before whom the case was tried and who placed defendant on probation, had power so long as he remained District Judge, to make chambers orders affecting that case, relating to probation 44

VI. The order of December 16, 1935, having been captioned in the "Southern District of New York" and duly entered in the "Southern District of New York", and being unvacated and unappealed from, must be conclusively presumed valid 47

VII. At most, it can only be claimed that the order of December 16, 1935 irregular, so it remains in full force and effect until vacated, which was never done 49

VIII. As the warrant was for violation of probation, and not for sentence, and as there was no probation to violate, the writ was properly sustained 50

IX. The defendant may not now be sentenced on two of three indictments on which conditional probation was imposed, where sentence was imposed on the third indictment and under which the sentence was served and the fine paid 51

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X. The application to have the court designate a place of incarceration, in which the defendant should serve a purported "unserved portion of his alleged sentence, was properly denied, because no sentence was imposed upon the defendant on the two indictments involved, but, on the contrary, in both of those matters the imposition of sentence had been suspended 53

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

WILLIAM D. FRAD,
Relator-Appellant,

against

JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF WILLIAM D. FRAD, APPELLANT.

Statement.

Relator William D. Frad appeals from an order of the Circuit Court of Appeals, Second Circuit, State of New York, which reversed (with an opinion, reported in *Kelly* v. *United States*, 89 Fed. (2) 866), the following two orders made by the Hon. William Bondy in the District Court for the Southern District of New York on the 26th day of January, 1937:

(1) An order (R. 132-133) denying the Government's motion "for an order committing the above named defendant William D. Frad to a penitentiary to be designated by the Attorney General of the United States," wherein the defendant should serve a purported "unserved portion" of a purported, but non-existent, four

year sentence, under indictments C 96-120 and C 80-944 (R. 121).

(2) An order (R. 134-137) sustaining a Writ of Habeas Corpus, granted to William D. Frad, who had theretofore been arrested under a warrant, issued pursuant to the following order of Judge Caffey (R. 32):

> "It appearing to the said Court that on March 26th, 1934, this Court suspended sentence on the above-named defendant and placed *him* on probation pursuant to the Act of March 4, 1925, and *that the above named Defendant has violated one of the terms of his probation,* that is: he has committed larceny by trick on the high seas.
>
> NOW THEREFORE, it is ordered that a warrant issue for the arrest of said probationer William Frad." (Italics ours.)

That order for the warrant was granted on the petition of E. Fred Sweet, Probation Officer for the Southern District of New York, which petition (R. 33-34) *failed to call the court's attention to an order which had been made and entered in this proceeding,* by Judge Inch prior thereto, under date of December 16, 1935 (R. 28-29), and which is on file with the clerk of the court for the Southern District of New York (R. 107), which order provided as follows (R. 29):

> "ORDERED, that the order or probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

The District Court opinion written by Judge Bondy is in the record (R. 129-131).

Jurisdiction.

The jurisdiction of this Court is invoked under *Section 240(a)* of the *Judiciary Code,* as amended by the Act of

February 13, 1925 (43 Stat. 938). The order for mandate of the Circuit Court of Appeals was entered May 17, 1937.

Statutes and Rules Involved.

The Statutes involved are *Title 18, U. S. Code, Sections 557, 724-726* (The *Probation Act*) and *Title 28, U. S. Code, Sections 22, 23, 481-475.*

Summary Statement of Matter Involved.

On March 21, 1934, the appellant, William D. Frad, came on for trial before Hon. Robert A. Inch, District Judge, and a jury, under three indictments, namely C 96-120, C 96-116 and C 80-944 (R. 21).

Before a jury was selected, he pleaded guilty to all three indictments (R. 22). Sentence was deferred until the 26th of March, 1934.

Hon. Robert A. Inch is a District Judge of the Eastern District of New York, who had been temporarily assigned to the Southern District of New York for the March 1934 Term, after the termination of which term he returned to his home district (R. 82).

The indictments were as follows:

Indictments C 96-116, charged him with conspiracy to violate Sections 211, 220 and 227, Title 22 U. S. Code under Section C 88 Title 18 U. S. Code (R. 9-14).

Indictment C 80-944, charged him in five counts with using passports obtained by false statements as to his identity (Sections 220, 221, Title 18, U. S. Code), (R. 4-8).

Indictment C 96-120, charged him in four counts with impersonation, by representing himself to be another person when entering the United States (Section 220, Title 8, U. S. Code), (R. 15-20).

Under the first indictment, he was sentenced to two years imprisonment, and ordered to pay a $1,000 fine, for which he was to stand committed until paid (R. 14).

Under indictment C 96-120, the following disposition was made (R. 19):

> "MAR 26 1934
>
> Imposition of sentence suspended.
> Probation for 4 years, to begin after serving sentence on C 96-116. *Subject to the standing probation* order of this Court.
>
> Inch, J."

The identical disposition was made under indictment C 80-944 (R. 8).

It is important to observe *that no sentence was imposed under indictment C 80-944 or C 96-120,* but that the disposition was *"imposition* of sentence *suspended."*

The appellee paid the fine of $1,000, and he was also committed to the Lewisburg Penitentiary, where he served his full sentence, with allowance off for good behavior, after which, he was discharged on November 2, 1935 (R. 68, 120).

The appellee then entered his term of probation under the other two indictments, and on November 15, 1935 signed the standing orders of the court as to probation (R. 25).

On December 13, 1935, Mr. Karasik, one of appellant's attorneys, attended Judge Inch at his chambers (R. 82), and recalled to him the facts of this case, and the further fact that the sentence had been served and the fine paid on indictment C 96-116, showed him that the appellant was suffering from heart trouble, and asked the court to discharge the appellant from probation, and to terminate the proceedings against him, as permitted by *U. S. C. Sections 724* and *725.*

Judge Inch called in Mr. Printzlein, the Probation Officer of the Eastern District, where the Judge was then sitting, and after discussing the facts (R. 51), told Mr. Karasik to give notice of such application to the Probation Officer of the Southern District (R. 51, 82-83). Such a notice was then prepared and served on the Probation Officer of the Southern District of New York (R. 51, 83). What happened thereafter is best explained in Mr. Karasik's own words, as follows (R. 83):

"I then personally served the papers on the Probation Office, and if your Honor will refer to the original papers you will find that the return day was blank, and I filled it in only when Judge Inch told me that he could hear the motion on certain days. *So I came to inquire personally from the Probation Office which day would be more convenient. He selected a day* and I inserted that day, and on that day, sir, we appeared. The probation officer was there; the defendant was there, and after argument Judge Inch entered an order on December 16, 1935 * * *" (see also R. 51).

Mr. Shears, the District Attorney in charge of this proceeding, now concedes that the Chief Probation Officer of the Southern District of New York received three days notice of hearing (R. 120).

The hearing on that application was heard by Judge Inch in his Chambers in the Eastern District of New York (R. 51, 82, 83). At that hearing Probation Officer Sweet appeared, and opposed the motion *on the merits* (R. 51, 83).

After hearing argument of both sides, Judge Inch stated that the sentence which he had imposed on the first indictment on the plea of guilty was "quite stiff" (R. 91), and that for that reason he had not imposed any sentence on the other two indictments, but had deliberately suspended the imposition of sentence thereon (R. 57-58). He further stated, that, in view of the fact that the fine under that first indictment had been paid and the sentence thereunder served, and in further view of the fact that medical proof submitted, both by doctors' statements and prison records, showed that the petitioner was suffering from serious heart trouble, he would grant the motion.

Subsequently, on December 16, 1935, an order was signed by him providing as follows (R. 29):

"ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged *from further supervision* and the proceedings

against him in this cause be, and the same are hereby terminated."

On a later occasion, when the Government moved to resettle the order, Judge Inch took occasion to restate what he had done in granting that order, and why (R. 57-58):

"Mr. Shears (Assistant District Attorney): The one further step that you did have at that time (December 16, 1935), the right to sentence, if you wished, but you did not at that time intend to sentence this man.

The Court: If for instance, I imagine, I had said, 'I sentence you to two years and suspend the execution of sentence' and then had entered an order such as I did enter, I would have had to impose that sentence or change that sentence in some way.

Mr. Shears: Yes, you would, which would have been void, of course.

The Court: Certainly.

Mr. Shears: You had no right to do it.

The Court: Yes, I had no right to do it. I did not impose sentence on this man on these two counts, thinking that he had suffered enough if he had served his two years, at his age, on the first indictment, especially where he has pleaded guilty and thrown himself on the mercy of the Court.

Mr. Shears: Yes, that is right.

The Court: Now, that being done he walks out, he serves his term, comes back still subject, with his plea of guilty, on two indictments.

Mr. Shears: Yes, that is right.

The Court: No sentence has been imposed.

Mr. Shears: That is right."

The following colloquy also then occurred between Mr. Shears and Judge Inch (R. 56):

"Mr. Shears: Now let me ask you one question which will resolve this entirely, your Honor. It was not your Honor's intention on December 16, 1935, to in any way sentence this man under the original indictment?

The Court: Not the slightest.

Mr. Shears: That is all I wish to know, your Honor.

> The Court: Not the slightest bit. There was no reason for me sentencing him, Mr. Shears; there was no reason for my sentencing him."

It will be observed that the order of December 16, 1935, itself contains the following recital, after other preliminary recitals (R. 29):

> "* * * and *due* notice having been given to the Honorable E. Fred Sweet, Probation Officer for the Southern District of New York; and *due* deliberation having been had thereon * * *" (Italics ours).

That order was captioned (R. 28):

> "UNITED STATES DISTRICT COURT
> Southern District of New York."

Furthermore, that order, so captioned, was entered in the Southern District of New York, was filed in the Southern District of New York, and is still on file in the Southern District of New York; all as required by law (R. 107).

Subsequently, on a petition made against appellant by Probation Officer Sweet (R. 33), based on a complaint against appellant, filed by a special investigator, charging defendant with alleged larceny on the high seas on November 18, 1936 (R. 30), which was itself based on hearsay (R. 31), an order was signed by Judge Caffey of the Southern District of New York, under date of November 20, 1936, for the issuance of a warrant to apprehend the defendant for alleged violation of one of the terms of his alleged probation (R. 32). He was arrested and bailed pending a hearing. *The petition failed to mention Judge Inch's order of December 16, 1935,* even though Probation Officer Sweet knew about it, having opposed the granting of that order. Judge Caffey does *not* appear to have had any knowledge of the December 16th order, when he granted his order for a warrant.

On December 1, 1936, a motion was made by the District Attorney of the Southern District of New York returnable December 8, 1936, for an order to re-settle the order of Judge Inch dated December 16, 1935.

It is to be observed that, though the notice of motion states that the motion is for an order "to set aside" (R. 35) the December 16th order of Judge Inch, that phrase must be read together with the prayer for relief in the motion itself, which merely asks for a *re-settlement and modification* of that order, and

> "that so much of the order of December 16, 1935 that purports to do more than discharge the defendant from probation supervision be set aside and *a new order entered in this cause*" (R. 39).

In other words, the government raised no questions to the propriety of Judge Inch's order—but merely sought to have its contents modified. On the hearing of that motion, the District Attorney specifically moved to *re-settle* the order, and did *not* seek to have it vacated (R. 59).

By stipulation, that motion was referred to Judge Inch, who, at the request of the Government, came over to the Southern District of New York, to hear the motion on December 8, 1936 (R. 42).

That motion was then heard by Judge Inch, the sentencing Judge, who then again sat and held court in the Southern District of New York (R. 42). He decided, after hearing both sides *on the merits,* that he would grant a *re-settlement* of the order, so as to insert the word "probation" into that part of the order which reads:

> "* * * and the proceedings against him under this cause, be and the same hereby are terminated",

so that it would read,

> "* * * and the *probation* proceedings against him under this cause, be and the same hereby are terminated" (R. 65).

The defendant (petitioner herein) took the position then, that the order could not be re-settled at this late date. Thereupon the District Attorney stated that he would "hold up

the entering of the order" of resettlement, "until such time as we find it necessary" (R. 65), and that he would not do so, anyhow, until after the court had disposed of the Writ of Habeas Corpus (R. 63).

So that the validity of Judge Inch's order of December 16, 1935, as an order in this proceeding, was recognized by the District Attorney of the Southern District of New York.

No order of resettlement was ever entered, so that the rights of the defendant on the Writ of Habeas Corpus, subsequently sued out by him, must be decided under the order of December 16, 1935 as it stands of record, entered and on file with the Clerk of the Southern District of New York.

On or about the 3rd of December, 1936, the Government gave notice to the defendant, and to his surety, that the indictments against him under C 96-120 and C 80-944 would be brought on for sentence on December 8, 1936 (R. 40, 41). But that notice was not pressed, and no application to sentence was ever made.

Then, on December 4, 1936, the defendant surrendered to the Marshall, under the order of Judge Caffey of November 20, 1936, charging the defendant with probation violation, and sued out a Writ of Habeas Corpus (R. 73), *on the ground that he could not be guilty of any probation violation by any act committed November 8, 1936* (R. 30) *in view of Judge Inch's order of December 16, 1935, which had discharged him from probation, and which had also "terminated the proceedings" against him* (R. 66-71). The return to that Writ was filed by John J. Kelly, Probation Officer, under date of December 8, 1936. A traverse to the return was filed by the defendant under date of December 10, 1936. Argument on the Writ came on before Judge Bondy on December 21, 1936 (R. 80).

The next day, the 22nd of December 1936, the United States Attorney served a notice of motion, returnable December 28, 1936, wherein he made the following prayer for relief, in regard to indictments C 96-120 and C 80-944 (R. 121):

"Wherefore, deponent prays that an order issue committing this defendant for the period of the *unserved portion* of his sentence of March 26, 1934, *to wit, four years,* in a place to be designated by the Attorney General of the United States, and for such other, further and different relief as to the court may seem just and proper." (Italics ours.)

The Decisions Below.

With regard to the motion to commit, it should be observed that *there had been no sentence imposed on these two indictments,* but that, on the contrary, "*the imposition* of sentence" had been suspended. So that no motion for an order to designate a place of incarceration for the purported "*unserved* portion of his sentence of March 26, 1934, to wit, four years," would lie. That motion was denied by the District Court (R. 132). *That is one of the orders involved on this appeal.*

In regard to the Writ of Habeas Corpus, the District Court held that, under *Title 18, U. S. C. Section 725,* the court could discharge the probationer not merely from further supervision, but could also terminate the proceedings against him in their entirety and give the defendant a full and complete discharge. Under that law, the order of Judge Inch of December 16, 1935 completely discharged the defendant, so that he was thereafter no longer amenable to any supervisory process of the courts in relation to those two indictments.

The District Court further held that, if the principle of *U. S.* v. *Greenhaus,* 85 Fed. 2, 116 (C. C. A. 2) applied to this case (on the ground that the sentences on all three indictments could be considered a single sentence, as they were heard and disposed of simultaneously, and that therefore the suspension of imposition of sentence and granting of probation on the last two indictments was illegal, in that it was coupled with a sentence on the first indictment for a prison term), the illegal provisions may be treated as a nullity. The District Court further held that no new sen-

tence could now be imposed, as the term of court, within which to resentence, had long expired, because a valid sentence was imposed with reference to all indictments, in that a valid sentence was imposed as to the first indictment, which sentence had been served and the fine paid by the defendant. In other words, if all three indictments are to be deemed a consolidated indictment, only one sentence could be imposed, and no re-sentence could be given after the sentence imposed had been served, and fine paid, even though part of the sentence then given may have been void.

The District Court, thereupon, held that the Government's motion to revoke the defendant's suspension of imposition of sentence, on the ground of violation of probation, should be denied, and it sustained the Writ of Habeas Corpus (R. 134). *That is the other order involved on this appeal.*

The Government appealed from those two orders, both of which were reversed by the Circuit Court of Appeals, which held that Judge Inch's order of December 16, 1935 was void because Judge Inch was not sitting in the Southern District of New York when he made that order.

Summary of Argument.

Under the provisions of *Section 725* of the *Probation Act*, the probationer may not only be discharged from the supervisory probation which was imposed by the trial judge when he suspended the imposition of sentence, but he may be fully discharged and the entire probationary proceedings terminated against him, so that he is thereafter no longer amenable to any supervision, or punishment either by reason of his conviction, or under the provisions of the Probation Act.

The section does *not* specify which Judge may make the order granting such relief. The trial judge has jurisdiction over the defendant *until actual imposition of sentence*. Here, *imposition* of sentence was *suspended* and the defendant placed upon probation. Therefore, the trial judge had continuing jurisdiction over the defendant until the defendant was either given a sentence or discharged. This is so even

where the trial judge was a visiting judge, and had returned to his own district after the termination of the trial term.

It may be true that a judge of the Southern District of New York also had such concurrent power to pass upon the granting of such an order. There is nothing, however, in the Probation Act which would bar the trial judge from such power, and the entire intent and purpose of the act indicates that the exercise of that power by the trial judge is preferable.

If there is a question of venue involved as to the proper place to make the motion, which was made at Chambers of the trial judge in the Eastern District of New York, on due notice to the Probation Officer of the Southern District of New York as required by *Section 725,* the question of venue should have been raised before the motion was argued on the merits. After argument on the merits and the decision, the question of venue, if involved at all, is deemed waived.

The venue question was not only waived by the Probation Officer, by arguing the application on the merits, but was subsequently waived by the United States District Attorney, when he argued a motion for re-settlement of the order which was entered on that application, and argued that motion on the merits in the Southern District of New York, before the same Judge, by stipulation.

As the defendant was fully discharged and all proceedings against him had been terminated, it was improper to thereafter charge him with an alleged violation of probation by an act *subsequently* committed, for there were no probation provisions then open for him to violate. The order for his arrest, for alleged probation violation, was therefore improperly granted, and the Writ of Habeas Corpus as to it was properly sustained in the District Court, and erroneously reversed in the Circuit Court of Appeals.

As the defendant had not had sentence imposed upon him on the other two indictments, but, on the contrary, the imposition of sentence having been suspended, there was *not* any purported "unserved portion" of the sentence to serve

for which a place of incarceration could have been designated by the Attorney General, so the motion to have such a place designated was properly denied by the District Court and erroneously reversed by the Circuit Court of Appeals.

If the principle of the *Greenhaus* case applies, that probation and a sentence for a term in prison cannot be concurrently imposed, then the sentence which was imposed, and which has been served and the fine paid, constitutes the full legal sentence and there may not now be a re-sentence for a longer term.

If, on the other hand, the principle of the *Greenhaus* case does not apply, then each of the dispositions on the several indictments was proper, and as the defendant was fully discharged by proper order, and the proceedings against him fully terminated by proper order, there was no probation violation which he could thereafter commit, and it was improper to thereafter apply for an order to bring the defendant in to submit to sentence.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the Probation Act, *Sections 724, 725, Title 18 U. S. C.*, provides for the execution of its provisions solely by the court in which the defendant pleads guilty or is convicted.

2. The Circuit Court of Appeals erred in holding that a District Judge, ordered by a senior Circuit Court Judge to hold court in another district, who there tries a case, suspending imposition of sentence and placing defendant on probation, is not empowered to sign an order as to probation in that case which the trial judge tried, when absent therefrom and sitting in another district.

3. The Circuit Court of Appeals erred in holding that the order of the trial Judge, which terminated the defendant's probation and terminated the proceedings against the de-

fendant, was void for lack of jurisdiction, because granted by him at Chambers when he was back in his home district after his visiting term was over.

4. The Circuit Court of Appeals erred in holding that the trial Judge, who had been a visiting Judge at the time of the trial and when the defendant came up for sentence and was placed on probation, and who was sitting in his home district when he entertained the application and decided the matter pertaining to probation which he had imposed, had no jurisdiction to pass upon that application.

5. The Circuit Court of Appeals erred in holding that neither the United States Attorney for the Southern District, nor the Probation Officer of the Southern District, had any right to act for the United States in the Eastern District of New York, in regard to *Sections 724* and *725* of *Title 18 U. S. C.*

6. The Circuit Court of Appeals erred in holding that the Government properly moved to revoke the probation and to sentence the defendant upon the second and third indictments, even though an order had been entered prior thereto discharging the defendant and terminating the proceedings against him.

7. The Circuit Court of Appeals erred in reversing the order entered in the District Court, which denied the Government's motion for an order committing the defendant to a penitentiary to be designated by the Attorney General of the United States, wherein the defendant should serve an "unserved portion" of a four year sentence under indictments C 96-120 and C 80-944 as to which imposition of sentence had been suspended, and no sentence ever imposed.

8. The Circuit Court of Appeals erred in reversing an order of the District Court, which sustained a Writ of Habeas Corpus, granted to the defendant, who had thereto-

fore been arrested under a warrant issued pursuant to an order of arrest of the defendant, for alleged violation of the terms of his probation.

9. The Circuit Court of Appeals erred in holding that under *Section 725*, the defendant could not be fully discharged and the proceedings against him fully terminated.

10. The Circuit Court of Appeals erred in holding that if the three indictments here, to which the defendant pleaded guilty at the same time, could be treated as if they were several counts in a single consolidated indictment, that the suspension of the imposition of sentence on two of the three indictments could be vacated and a larger sentence imposed and the enlarged sentence ordered, even though the sentence on the third indictment had been served and fine imposed paid.

POINT I.

The order of December 16, 1935 fully discharged the defendant and finally terminated the proceedings against him, under *Section 725* of the Probation Law.

Under *Section 725*, two types of probation are created, namely:

(a) *sentence probation*, under which a defendant is subject to probation supervision by Probation Officers during the time fixed for probation by the sentencing judge when he suspends the imposition of sentence, or suspends the execution on a sentence imposed, and

(b) *statutory probation*, under which the court has power, after the supervisory "sentence probation" period is ended, but within the maximum period for which the defendant might originally have been sentenced, to have

him brought in to court and to then impose such sentence upon the defendant as might originally have been imposed.

(See *Hollandsworth* v. *U. S.*, 34 Fed. [2] 423 p. 428 [C. C. A. 4; 1929]).

That section further gives the court the power to have the probationer brought in at any time while he is on probation, to investigate the facts of his probation, and then, the section says:

"* * * The court may thereupon discharge the probationer from further supervision *and may terminate the proceedings against him*, or may extend the probation, as shall seem advisable."*

It will be observed that under the above language of Section 725 the power is given to do the following things:

(a) "discharge the probationer from further supervision,"

(b) "terminate the proceedings against him,"

(c) "extend probation."

So that there is created by *Section 725* and, indeed, by the entire Probation Act, a proceeding which is apart from the Criminal proceeding, though appendant thereto, and which

* *Section 725* also has provisions for treating *probation violators*. It says that they may be brought in, either with or without a warrant, and then provides as follows:

"* * * thereupon the court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."

It was those provisions which this court considered in *Escoe* v. *Zerbst*, 295 U. S. 490.

These latter provisions, however, relate only to *probation violators*, and are distinguished and separated from the preceding provisions, which apply to probationers who are *not* violators.

At the time that the application in question was made for the order of December 16, 1935, *it is undisputed that the defendant was not a probation violator*. He, therefore, came within the first provisions quoted above.

may be treated as a separate thing,—namely, probation proceedings.

U. S. v. *Gargano,* 25 F. (2) 723, 724.

In the case at bar, the order in question reads as follows (R. 29):

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision *and the proceedings against him in this cause be, and the same are hereby terminated.*"

The question now arises as to the meaning of the phrase of *Section 725* under which this order was drawn, which says that the order discharging the defendant *"may terminate the proceedings against him"*. Does this phrase mean merely the same thing as is expressed by that provision of the section which says that the "court may thereupon discharge the probationer from further supervision?" That would be redundancy, and the section will surely not be so construed.

Sutherland on Statutory Construction, 2nd Ed. Vol. II, Section 380, says:

> "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute (citing cases). Statutes should be so construed that effect may be given to all of their provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another" (citing cases).

Especially is that so here as the two phrases are connected by the word *"and"* which indicates that something was *added* by the latter provision.

What is the something that was added?

Surely the "proceedings", which the law says the court "may terminate" were *not* the mere supervision of the defendant, because that did *not* constitute a proceeding. There are only two proceedings involved, namely, the *criminal* proceedings and the *probation proceedings*. The criminal proceedings were still open, because no sentence had been imposed on the plea of guilty. *Burns* v. *U. S.*, 287 U. S. 216 (1932) (quoted *post* p. 31). There were also the probation proceedings pending, which is a continuing matter. *Burns* v. *U. S., supra,* page 219; *U. S.* v. *Antinori,* 59 F. (2) 171 (C. C. A. 5, 1932). The probation proceedings which were created by the Probation Act, are something separate and apart from the criminal proceedings, though appendant thereto (See *U. S.* v. *Gargano,* 25 F. (2) 723, p. 724). It is true that there are two kinds of probation under which a defendant could be held—either the *sentence probation* provisions of the trial judge's order, which also suspended the imposition of sentence, or else the *statutory probation,* which by *Section 725* followed the sentence probation period. But, as has been seen, *both* of these probations constitute parts of the *Probation Proceedings,* which were created by the Probation Act.

In *Burr* v. *U. S.*, 86 Fed. (2) 502, (C. C. A. 7, 1936) it was said, per *Briggle, J.*, (p. 503):

> "We know of no instance wherein the court may permanently suspend sentence or the imposition of sentence except by virtue of the terms of the Probation Act."

In *Kaplan* v. *Hecht, U. S. Marshal,* 24 Fed. (2nd) 664 (1928) the court states:

> "Hence the judge is given the power to suspend sentence—a thing he could not do without legislation, after the decision in Ex parte United States, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 335. The purpose is to avoid imprisonment so long as the guilty man gives promise of reform.

> Clearly, therefore, probation is not intended to be the equivalent of imprisonment. The aim of the statute is reformatory, not punitive, and its language carries this aim into effect" (p. 665).

Clearly then, where *Section 725* gives the court power to "terminate the proceedings", if this power is not to terminate the criminal proceedings, *it is certainly the power to terminate the entire probation proceedings which were set up by the Probation Act.* Otherwise, if it merely meant to give the court power to terminate the supervisory sentence probation, it would be surplusage, and meaningless, because the section has already given the court the power to "discharge the probationer from further supervision", and this further clause is supposed to be an additional power which is preceded by the word *"and"*.

In the case at bar, the order of December 16, 1935, not only terminated the supervisory sentence probation, but went on to provide that

> "* * * the *proceedings* against the defendant in this cause be and the same are hereby *terminated.*"

That is the language of the statute.

If this sentence did not mean that the criminal proceedings were terminated, it certainly meant that the entire probation proceedings were terminated, because there were no other "proceedings" to be terminated.

It follows, therefore, that by the order of December 16, 1935, even as interpreted by the Government, there was a termination of the *statutory probation,* in addition to the termination of the supervisory *sentence probation,* and that the *entire probation proceedings* created by the *Probation Act* were terminated. By that order, under any construction, the defendant was discharged from any and every probation provision, and, thereafter, there could be no probation violation for which he could be held.

It follows, therefore, that the subsequent granting of the warrant for his arrest, for alleged subsequent probation vio-

lation, was improper, and that the Writ of Habeas Corpus was properly sustained in the District Court, and that this order should be reinstated.

In the two instances, where the pertinent provisions of *Section 725* have been passed upon, it has been squarely held that an order made after probation has begun which terminates "the proceedings", terminated the *entire* proceeding against the defendant and not merely the probationary supervision.

> *U. S.* v. *Antinori*, 59 F. (2) 171 (C. C. A. 5, 1932);
> *U. S.* v. *Maisel*, 26 F. (2) 275 (D. C., S. D. Texas 1928).

This would have been so, even if the order in the case at bar had been re-settled, to provide that it terminated "probation proceedings" (R. 63, 65), though it was not resettled.

In the *Maisel* case, *supra*, the defendant, after being convicted, was given a suspended sentence, and placed on probation for a two year period. At the end of the two year period, *when his probation period was over*, he made an application to the court to have the proceedings against him terminated. In view of the fact that he had already served his complete period of probation, his application could have had no significance, unless its purpose was to relieve him from something which was not included in the sentence probation itself. This additional something, obviously, was the criminal proceedings itself, and any possible further control that the court might have over him beyond the probation period fixed by the trial court, but during the statutory probation period.

In granting that application, the court said per *Hutcheson, J.* (p. 276):

> "The statute under review is drawn so as to confer upon and invoke the exercise *by the sitting judge* of, in the doing of justice, the broadest equitable power in the light of the facts elicited and to be elicited as to the particular defendant, *both at the time of trial and dur-*

> *ing his period of suspension,* to the end that, if it appear that the ends of justice and the interests of the public and of the defendant require, not only that the defendant be unconfined, but that he may redeem himself during the period of his probation so fully *as to have the judge, under the statute, discharge the proceedings against him.* * * * the interests of the public and of the defendant alike, are subserved by *fully discharging the proceedings against the prisoner;* and it will be so ordered." (Italics ours.)

This case has been commented on and its holding approved in *23 Illinois Law Review 832* and in *7 Texas Law Review 161.*

The Government in its brief below, admitted that in the *Maisel* case, the defendant received "a full and complete discharge" (p. 25).

The claim was made, however, by the Government, in its brief below (pp. 24-25), that the *Maisel* case did not show the nature of the crime, nor the length of time for which the defendant could have been convicted, and that, therefore, the decision there rendered was innocuous. It is obvious, though, that if the possible sentence for the crime committed had not been beyond two years, there was no need or purpose for making the application to have the proceedings terminated, because the probation itself covered the two years period, so that as a matter of law, the proceedings had terminated of their own accord. *That order, obviously, relieved the defendant from something that hung over him beyond the two year probation period,* and that went into the "statutory probation" period.

It is perfectly obvious that the facts in the *Maisel* case, *supra,* resembled the facts in the case at bar, so that the decision there rendered is here applicable.

In *U. S.* v. *Antinori, supra,* the court made a lengthy and careful study of *Section 125,* and held that the Probation Act was remedial, and then made this significant observation (p. 172):

"As is well expressed in the act itself, the law is designed to vest the *trial judges* with discretion to extend mercy to the defendant when the ends of justice and the best interests of the defendant and the general public would be subserved thereby. The act gives the trial court authority to suspend either the imposition or execution of sentence and to place the defendant upon probation upon conditions. If, in a shorter time than provided by the order, it should appear that the defendant has rehabilitated himself and become a useful citizen, *the court may terminate the proceedings against him.*

* * * * * * *

There could be no doubt, both by the letter and intent of the Probation Act, that jurisdiction of the court is continued after the term over a case in which the sentence is suspended, *for the purpose of terminating the proceedings and discharging the defendant* or setting aside the probation and reinstating the original sentence.

* * * * * * *

Assuredly Congress could provide by statute for the retention of jurisdiction beyond the trial term for that purpose, and could also provide that the sentence might be reduced. We think that in enacting the Probation Act Congress has done so." (Italics ours.)

Then comes a further, even more signicant part of the opinion, for the court then says (p. 172):

"Suspension of sentence * * * implies that the jurisdiction of the court over the case and over the defendant is continued until the suspension of sentence is terminated, either by the *final discharge* of the defendant or by the imposition of punishment." (Italics ours.)

In the case at bar, the defendant was given a *"final* discharge," when "the proceedings" against him were "terminated."

The courts have said that the Federal Probation Act must be construed in the same liberal way that the State Courts have interpreted the State Probation Acts.

In *Ackerson* v. *U. S.*, 15 F. (2) 268 (C. C. A. 2; 926) the court said:

> "Congress * * * framed a statute along the lines of the 'probation acts' now well known in a considerable number of states. It seems to us a reasonable conclusion that since this statute is not pioneer, Congress expected and intended that it should receive at the hands of the courts the same distinctly benevolent interpretation that most of the state tribunals have accorded to the probation acts of their several states."

See also

U. S. v. *Antinori*, 59 F. (2) 171;
Kaplan v. *Hecht*, 24 F. (2) 664, 665.

With this thought in mind, the decision in the case of *Marks* v. *Wentworth*, 199 Mass. 44 (1908) assumes much importance in determining the effect of the phrase "terminate the proceedings", since "the American system of probation, * * * originated in Boston, Mass., in 1869 * * *" *U. S.* v. *Maisel* (*supra*) page 276, and the *Marks* case is an adjudication of a portion of the Massachusetts Probation Act which is directly in point here.

In the *Marks* case, the defendant was placed upon probation and imposition of sentence was continued. The defendant eventually brought a mandamus action to compel the Trial Judge to impose a sentence upon him or to dispose of the case. The Trial Judge had stated that he thought the only disposition that he could make of the case was to put it "on file", which, in effect, meant to continue the probation indefinitely. In granting the Writ of Mandamus, the court said that the trial judge had power to dispose of the case by not only freeing the defendant from any further probationary supervision, but by *completely dismissing the case.* The court said, per *Knowlton, C. J.* (p. 46):

> "* * * If for any reason the Judge would think it better, in the interest of law and justice, to dismiss the case rather than to place it on file, we are of the opinion that the statutes give him authority so to do."

It also said (p. 46):

> "Although the statute does not say in terms that if, after a season of probation, the object of the probation seems to the court to have been accomplished, in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, *the court may finally dispose of the case by a dismissal of it*, we think this logically follows from the principles which lie at the foundation of the legislation, and from the general provisions which seem to leave the whole matter in the control of the court. * * * *We are of opinion that the large discretion that is given to a court, in such cases includes jurisdiction to dismiss the prosecution, and finally discharge the defendant after a period of probation, if that seems best.* (Italics ours.)

The Massachusetts Act did *not* specifically give the Court or Judge the power to discharge the defendant or to terminate the proceedings against him. Yet, in the *Marks* case, it was held that under that Probation Act, the defendant could be given a full discharge and the proceedings against him completely terminated. This was as early as 1908. The *Federal Probation Act,* which was enacted in 1925, *does* contain such express provisions in *Section 725.* As the Federal law was enacted with the decisions of the States courts on that subject in the minds of the legislators, it would seem that the decision made in the *Marks* case has an *a fortiori* application under the broader provisions of the Federal Probation Act.

So that, under *Section 725,* an order may be entered, "fully discharging the proceedings against the prisoner," (*Maisel* case, *supra*), and such an order constitutes "the *final* discharge of the defendant" (*U. S.* v. *Antinori, supra*).

Thereafter, the jurisdiction of the court over the case and over the defendant was at an end. So that there could not be, and is not any proceeding pending, or probation provision in existence, which the defendant might thereafter have violated.

It follows, that the warrant of arrest of the defendant, for allegedly having thereafter violated probation was erroneously granted.

Judge Caffey, in granting the order for the warrant, had not been informed of the existence of the order of December 16, 1935. Otherwise, it is fair to assume, he would not have ignored that order, and would not have granted the order for the warrant.

In any event, the warrant having been wrongfully issued, the Writ of Habeas Corpus, releasing the defendant therefrom, was properly sustained by the District Court, and should be reinstated.

POINT II.

Until sentence or discharge of the defendant, the Trial Judge's jurisdiction continues over him, even at a subsequent term, and even though the Trial Judge was a visiting judge who has, in the meantime, returned to his own district; particularly so under the provisions of the Probation Act. Judge Inch, therefor, had the power to make the order of December 16, 1935.

Did Judge Inch have the power to make the order of December 16, 1935, which related to defendant's probation?

In this connection, it is important to observe the relationship that exists between probation and sentence. The imposition of sentence could not have been suspended for a prolonged period, except under the provisions of the Probation Act, and all further steps thereafter, as to sentence in that criminal proceeding, can be taken only under and by virtue of the provisions of that Act. So that, though probation is not part of a sentence, it is appendant to and part of the sentencing power.

Therefore, if, after the Trial Term had expired Judge Inch had jurisdiction in relation to the sentence of the defendant, it would follow that he had the jurisdiction and the power to make orders of a probationary nature, which would discharge the defendant and terminate the proceedings against him.

That the jurisdiction of the *Trial Judge* extends over the defendant until either sentence is imposed, or until the defendant is discharged, is settled by a line of decisions.

Rachmil v. *U. S.*, 288 Fed. 782 (C. C. A. 2; 1923), Cert. Denied, 262 U. S. 751; 43 Sup. Ct. 700;
State v. *Stevenson*, 64 W. Va., 392, 62 S. E. 688 (1908);
Shore v. *Splean*, 258 Fed. 150 (C. C. A. Dist. of Columbia; 1919);
Ex Parte De Angelo, 50 F. (2) 847, (C. C. A. 6; 1931);
U. S. v. *Garsson*, 291 Fed. 646, (D. C. S. D. N. Y.; 1923);
Rosenwinkel v. *Hall*, 61 F. (2) 724 (C. C. A. 7; 1932);

The jurisdiction of the Trial Judge was broadened by the Probation Act.

In *Mouse* v. *U. S.*, 14 Fed. (2d) 202, the Court said, per Pollock, J. (p. 203):

> "The general rule is, after the term at which a case has been finally determined and ended by final judgment or decree has fully expired and ended, the court loses all jurisdiction and power over its judgment or decree. The probation act above quoted must have been by Congress enacted with this general rule in view. Now the act as above quoted is seen to provide for the probation of one convicted or pleading guilty before sentence is imposed, by suspending the imposition of sentence, and also by suspending the execution of a sentence imposed."

So that until sentence or discharge, the Trial Judge has jurisdiction over the defendant as a part of the Probation Act.

So too, a visiting Trial Judge, even after he returns to his home district, carries with him jurisdiction over the defendant until the defendant is sentenced or discharged.

Title 28, U. S. C. Section 22, (enacted in 1911 and amended in 1913 and 1922), gives a visiting Judge, after he has returned to his own district,

> "* * * the power to decide *all matters* which have been submitted to him within such (visited) district."

Section 23 supplements *Section 22.* That the provisions of *Section 22* apply to visiting district judges is settled. *Hicks v. U. S. Shipping Board,* 14 F. (2) 316 (1926).

That the matter of sentencing the defendant is one of those *"matters"* which adhere to the visiting judge, when he returns to his home district, was squarely decided in *Rachmil* v. *U. S., supra,* and in *U. S.* v. *Garsson, supra.*

In other words, the trial judge's jurisdiction continues over defendant until sentence or discharge, whether the trial judge is a resident judge or a visiting judge.

In the *Rachmil* case, *supra,* which arose right after *Section 22* went into effect, a judge of the Western District of Pennsylvania was assigned temporarily to sit in the Southern District of New York. While he was so sitting, the defendant came on for trial on the charge of evading income tax payment, and was found guilty by a jury. The imposition of sentence was postponed, pending the making of motions for a new trial, and the study of the case and of the defendant's record by the authorities and by the Trial Judge. The trial term thereafter expired and the Trial Judge returned to his own district in Pennsylvania. At a subsequent term, the Pennsylvania Judge returned to the Southern District of New York for the purpose of imposing sentence on the defendant, and did so. The defendant attacked the sentence on the ground, among others, that the Pennsylvania Judge had

lost all jurisdiction over the defendant after the expiration of the Trial Term and after his return to his own district.

The Circuit Court of Appeals for the Second Circuit, however, held that *the Trial Judge had continuing jurisdiction* over the defendant after conviction up to the time of sentence, saying, per *Manton, C. J.* (p. 785):

> "The District Judge who presided at this trial, after the verdict of conviction, returned to his own district (the Western District of Pennsylvania), and later returned to the Southern District of New York before the entry of the judgment. This became necessary because of the delay between the motion of the defendants to set aside the verdict, the submission of briefs, and the study of the case by the trial judge. When he returned, he imposed sentence. *The imposition of such sentence was the completion of* **unfinished business** *which arose during the term for which he was assigned to sit in the Southern District of New York.* The prosecution was not complete until the entry of the judgment. The court has the power to finish at a succeeding term the business begun at a previous term. *Walker* v. *Moser,* 117 Fed. 230, 54 C. C. A. 262. A District Judge who tried the case is compelled to impose sentence after the jury's verdict finding guilt. *Ex Parte U. S.,* 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917 E. 1178, Ann. Cas. 1917 B, 355. The court does not lose jurisdiction of the case in the meantime. *Miner* v. *United States,* 244 Fed. 422, 157 C. C. A. 48, 3 A. L. R. 995." (Italics Ours)

In the *Shore* case, *supra,* a sitting Judge in the Police Court became ill. Pursuant to statute, the Chief Justice of the Supreme Court appointed Judge McMahon, a Municipal Court Judge, to fill the vacancy caused by the regular Police Judge's illness. A defendant was tried before him and found guilty. When the time came for Judge McMahon to sentence the defendant, the two regular police Judges were in court discharging their duties. The defendant Shore contended that Judge McMahon's power terminated as soon as the regular Police Judge commenced his regular duties, and that, therefore, the sentence imposed by Judge McMahon

was invalid. This contention was dismissed, however, the court holding, per *Smythe, C. J.* (p. 152):

> "It was undoubtedly the intention of Congress to provide for a temporary judge, that he should perform the duties of the position during his incumbancy *and complete any work entered upon him before he withdrew from the case.*"

In other words, the substance of the above case was that the jurisdiction of a temporarily assigned Judge continues until the defendant is sentenced or discharged.

In *Ex Parte De Angelo, supra,* the appellant had pleaded guilty. Sentence was deferred, and, four terms later, the defendant was sentenced. It was contended that the sentence was invalid, because the Court had postponed sentence indefinitely, and that, several terms of court having expired, jurisdiction to impose any sentence had been lost. This contention was rejected, the court saying, per *Simmons, J.* (p. 848):

> "When the appellant's sentence was postponed the Federal Probation Law was in force. * * * Granted that in the instant case the sentencing judge did not specifically indicate that the postponement of sentence was a suspension of its imposition under the Probation Law. We are dealing with the question of judicial power. If what the court did, by whatever name it may be called, operated as a suspension of the imposition of sentence, it was clearly within the power of the court to do it."

In the *Rosenwinkel* v. *Hall* case, *supra,* the defendant made the point that the court was without jurisdiction to impose sentence, because an entire term of court had elapsed between the term at which he pleaded guilty and the term at which he was sentenced. But this contention was rejected, the court saying, per *Evans, J.* (p. 725):

> "That the *Trial Judge* in the instant case stayed the sentence, not to give the accused an absolute remission of all penalty, but to enable the court to better satisfy

its own mind what the punishment should be, is the necessary and logical inference deducible from the record before us. This being the situation, it follows that the court was acting within its power, unless the fact that it failed to pronounce the sentence within the term divested it of all power to do so later." (Italics ours.)

The court then went on to say (p. 726):

"Convinced as we are that the statute above quoted (Probation Act) is one for the benefit of the accused, such benefit to be obtained through an enlargement of the powers *of the court imposing a sentence in a criminal case,* we follow *Ex Parte De Angelo, supra,* and hold that *the court that tried appellant had the power, at a subsequent term, to sentence him.*" (Italics ours).

In that connection, it was well said in *Ackerson* v. *U. S.*, 15 F. (2) 268 (C. C. A. 2; 1926); per *Hough, J.* (270):

"The power of suspension is lodged in the court, and any acting judge constitute a District Court."

Though that case refers to resident district judges, the same rule would apply to visiting district judges. *Rachmil* v. *U. S., supra.*

In *U. S.* v. *Garsson, supra,* Judge Foster was designated to sit during the period beginning September 1, 1922 and ending November 1, 1922. On November 1, 1922, certain defendants were being tried. Their co-defendants had pleaded not guilty, and had not been sentenced. On November 21st, the jury brought in a verdict of acquittal as to those defendants who were on trial. On the 22nd, Judge Foster allowed those defendants who had pleaded guilty, to withdraw their pleas and plead not guilty. The court said, per *Learned Hand, J.* (p. 648):

"Judge Foster's unfinished business at least did not terminate with the acquittal of those who stood trial. The (Trial) Judge had yet to dispose of those who had pleaded guilty, presumably by a sentence. * * * I think

that his appointment must have been understood to cover all routine *matters*, of which this was one, * * * and that he was authorized to finish anything so arising after having once taken jurisdiction over it." (Italics ours.)

In other words, the above case again illustrates the proposition that a Trial Judge does not lose jurisdiction over a defendant, despite the fact that the time of his visiting commission had expired, until the defendant is either sentenced or discharged.

So that, as has been seen from the foregoing cases, the jurisdiction of the Trial Judge over the defendant continues even at a term subsequent to the one at which the defendant was tried or pleaded guilty, or even subsequent to the term when a visiting judge returns to his own district.

Several of the foregoing cases were decided *before* the Probation Act went into effect. At that time, the court could extend the period for fixing sentence for a given reason, *but not indefinitely. Ex Parte U. S.*, 242 U. S. 27; *U. S.* v. *Murray*, 275 U. S. 347. As was stated in *Ex Parte Singer*, 284 F. 60 (C. C. A. 3; 1922), per *Wooley, J.* (pp. 62-63):

"As to the power of a court to suspend sentence in given circumstances, there can be no doubt. Certainly, it is competent for a court temporarily to suspend its judgment, and to continue to do so from time to time, and indeed from term to term, in a criminal cause for the purpose of hearing and determining motions and other proceedings which may occur after verdict and which may properly be considered before judgment; also to gain information that will lead to a just sentence * * * and, in fact, 'for any legitimate purpose', or 'good and valid reason'.

* * * * * * * * *

"when (in the absence of statute or accepted practice) a court postpones sentence silently, that is, without an indication of a lawful purpose, it in effect postpones sentence indefinitely. The weight of authority is that when a court has, without valid reason and quite

> indefinitely, postponed the pronouncement of sentence, it cannot at a subsequent term proceed to judgment by imposing sentence."

The necessary statutory authority for a Trial Judge to indefinitely extend the sentence, which was referred to in the *Singer* case, was supplied by the subsequently created *Probation Act.*

Indeed, in the case of *Ex Parte De Angelo,* the court expressly says (p. 848):

> "The decisions in the *Singer* Case * * * and others were predicated upon the absence of a statute conferring upon courts the power to suspend sentence. We now have the statute (referring to the Probation Act)."

The rule was, therefore, established by statute that the trial judge continues to have the jurisdiction over the defendant until his sentence or discharge.

In the case of *Burns* v. *U. S.*, 287 U. S. 216, it was held, per *Hughes, C. J.*, (p. 222):

> "He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the Court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of the beneficient purpose, as otherwise probation might be more reluctantly granted, or when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice (citing cases)."

That the Trial Judge is empowered with jurisdiction over the defendant after the trial term and during the probation period and up to the actual sentence or discharge, is decided in *U. S.* v. *Maisel,* 26 F. (2) 275, (quoted *supra,* p. 20), and also in *U. S.* v. *Antinori,* 59 F. (2) 171 (C. C. A. 5; 1932) (quoted *supra,* p. 22).

It may, of course, be true that the Trial Judge shares concurrent power with a subsequently sitting Judge of the Trial Court in finally sentencing or discharging the defendant.

But there is nothing in the Probation Act which deprives the actual trial judge of the jurisdiction he has over the defendant until sentence or discharge; indeed, on the contrary, as has been seen, that act enlarges his jurisdiction over the defendant.

In *Ackerson* v. *U. S.*, 15 F. (2) 268, 1926 (C. C. A. 2), the Court said, per *Hough, Ch. J.* (p. 270):

> "There is nothing specifically said in the Statute to prevent a convict from selecting some particular Judge before whom to prefer his plea for mercy, and nothing positive to prevent him making the round of all the Judges who may help the court of original jurisdiction in which he was convicted, and much less does the statute in terms cover cases (such as are shown above) of death or *removal* (of the trial judge) *from district.*" (Italics ours.)

From the foregoing, it may properly be said that one of the *"matters"* which were submitted to Judge Inch as one of the incidents of the case before him, was the sentencing of the defendant. Judge Inch did not sentence the defendant while he remained in the Southern District. This was, therefore, part of the

> *"unfinished business* which arose during the term for which he was assigned to sit in the Southern District Court" (*Rachmil* v. *U. S., supra*).

Where a Judge has not imposed sentence, jurisdiction of the Trial Judge over the defendant continues until sentence or discharge of the defendant. This rule applies also to the Trial Judge who was a visiting judge at the time of the trial, and who has since returned to his own district, because, by the provisions of *Section 22 of Title 28, U. S. C.*, a visiting judge, after he has returned to his own district, has

> "* * * the power to decide *all matters* which have been submitted to him in the (visited) district".

POINT III.

The Probation Act did not designate the specific judge who should pass upon the application for discharge of the probationer or termination of the proceedings, but left it open.

The Trial Judge is generally the preferable judge to pass upon such relief, even though a sitting judge of the court might also do so.

Not only did the Probation Act extend the Trial Judge's *judicial* jurisdiction over a guilty defendant as a subsequent term (See Point II, *supra*, p. 25), that Act also added to the Trial Judge's jurisdiction over the defendant by vesting in him a *quasi-administrative* function, namely, the supervision of the defendant's probation. By the very wording of the Act, the trial courts may.

> " * * * suspend the imposition or execution of sentence and place the defendant upon probation for such period as they deem best; * * *"

And in *Ackerson* v. *U. S.*, 15 F. (2) 268, 270, it was said:

> "The power of suspension is lodged in the court and any acting judge constitutes a District Court."

This obviously refers to the Trial Judge because he is the judge who is suspending the sentence.

That the Trial Judge may act under the provisions of *Section 725* of the *Probation Act* appears from a study of that section. It is important to observe that it contains two distinct sets of provisions relating to two distinct types of judicial acts, to be performed:

> (a) Provisions giving the court power to *discharge* the probationer from further probation supervision and to "*terminate* the proceedings against him" or to extend the probation, and

(b) Provisions as to probation violators giving the court power to *revoke* probation and to revoke the suspension of sentence and to impose such sentence as might originally have been imposed. (In the case at bar, the defendant was *not* a probation violator at the time the application for the order of December 16, 1935 was made and granted.)

Significantly, the section does *not* designate the particular court which may hear the application relating to *discharge* of the probationer and for *termination* of the proceedings. *That has been left open.*

Section 725, U. S. Code Title 18, states:

"When directed by *the court,* the probation officer shall report to *the court* with a statement of the conduct of the probationer while on probation. *The court* may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation as shall seem advisable" (italics ours).

That the specific court which was to act was left open by design would appear from a consideration of the Act's provisions relating to revocation.

In regard to revocation of probation as to probation violators, the section makes a distinction between probation violators who are arrested by warrant for probation violation, and those who are arrested without a warrant, and specifies that *probation violators, who are arrested by warrant,* should be taken before *the court which issued the warrant, and still further provides that the warrant in such a case is to be issued only out of the sentencing court* (*Escoe* v. *Zerbst,* 295 U. S. 490). The section, however, does *not* specify the court to which a probation violator shall be taken, when he has been arrested *without a warrant,* though it does provide that he may be arrested without a warrant *"wherever found".*

It is, therefore, significant to observe, that the Act specifies the particular court which may hear the application in only

one set of circumstances, namely, as to a probation violator who has been arrested by warrant, and has left open the court as to all other provisions in the section. This flexibility of the section, as to all other provisions thereunder, has been recognized by the Circuit Court of Appeals for the Second Circuit itself.

In *Ackerson* v. *U. S.*, 15 F. (2) 268 (C. C. A. 2, 1936), the court said, that the Probation Act left the situation presented by the case at bar open. (See quotation, *supra*, p. 32).

The framers of the Probation Act thus appear to have deliberately left open to the probationer the right to apply to the Trial Judge in a situation like the one at bar, for an order discharging him and terminating the proceedings against him. It may be that, after the trial term is over, a subsequently sitting judge of the Trial Court shares concurrently with the Trial Judge, the quasi-administrative power of administering probation. If that is so, the Trial Judge may in his discretion either act on that application, or else, he may send the probationer and his application to the then sitting judge of the Trial Court. Indeed, where a probationer wishes to make application for an order discharging him and terminating the proceedings, he may either apply to any sitting judge of the Trial Court, or he may apply to the Trial Judge himself, even though that judge is sitting as a court in some other district. (See *Ackerson* case, quoted, *supra*, p. 32.)

In granting to the probationer the benefits especially created for him, the Probation Act must be liberally construed.

> "To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end." (*Burns* v. *U. S.*, 287 U. S. 216, *per Hughes, C. J.*, p. 220.)

The *Probation Act* (*Section 725*), specifies that "The Court" may discharge the probationer. Regardless of whether this be interpreted to mean any federal court "having original jurisdiction of criminal actions," or only the sentencing court, the fact remains *that Judge Inch was acting as a court,* when he did act.

The fact that he was the Trial Judge of the case at bar, would permit him to so act, even though he were then sitting as a judge of the court of the Eastern District. Particularly as the Probation Act is to be liberally construed in favor of probationers.

That the *Probation Act* was enacted "for the benefit of the accused" has been repeated so often by the court that it requires no extensive citation in support of the proposition. *Rosenwinkel* v. *Hall,* 61 F. (2) 724, 726 (C. C. A. 7; 1932).

In the *Rosenwinkel* case, *supra,* the court added (p. 726):

> "Its object being human and benevolent, the statute (the Probation Act) should be given a broad interpretation."

In *Nix* v. *James, 7 F. (2) 590, page 593, it* was there also said:

> "In view of the liberal construction to which the statute is entitled, we cannot read into it a limitation on the power granted not written there by Congress."

Moreover, *Title 28, Section 22* of the *Judicial Act, states:*

> "Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide *all "matters"* which have been submitted to him within such (visited) district * * *." (Italics and quotes ours.)

So that Judge Inch was actually acting as a court for the Southern District within the jurisdiction he had over the defendant until sentence, and as a supplement to that jurisdiction.

The suspension of the imposition of sentence and the placing of the probationer on probation was one of the *"matters"* which was submitted to Judge Inch while sitting in the Southern District of New York. Probation was the reason why the imposition of sentence was meanwhile suspended by the Trial Judge. This is part of the Trial Judge's *"unfinished business"* (See *Rachmil* case quoted, *supra,* p. 27).

Since the courts have, time after time, repeated the proposition that the Probation Act must be liberally construed so that the probationer will obtain its full benefits, the case at bar presents an appropriate instance where that liberal interpretation should be applied. Especially so, when the Trial Judge's intimate relationship with the probation of the defendant is considered.

The theory of probation is that the court is attempting to work out the reformation of the defendant. In the report of The Advisory Committee on Penal Institutions, Probation and Parole (1931) it is said,

> "Fundamentally, probation is now regarded in this country as a judicial function as a mere extension of the authority of the Judge to whom the probation officer is responsible and who really, in theory, controls the treatment that is called probation." (Vol. III, p. 204 of National Committee on Law Observance and Enforcement Reports.)

Who would be in the best position to deal with the prisoner on the basis of a fuller acquaintanceship, the Judge who tried the case, or a new Judge? Obviously, the Judge who originally tried the case and granted the probation and suspended the imposition of sentence. The Trial Judge would be interested, step by step, in the reformation of the defendant. Unnecessary formalities should not stand in the way of permitting the Trial Judge, who originally placed the defendant *on probation*, to keep up the individualization of the reformation.

Especially is this important when the probationer applies for an order discharging him and terminating the proceed-

ings against him. The mere fact that the Judge who heard the case and placed the defendant on probation is thereafter sitting in some other district, should not preclude the probationer from applying to that judge for a valid order of discharge. It is to the probationer's advantage, in view of the Trial Judge's familiarity with the case, to come before that judge, rather than some other judge, who would be unfamiliar with the status of his case and the progress of his reformation, especially in cases where the imposition of sentence has been suspended.

Nor does the Probation Act take away that power from the Trial Judge, even though he be in another district.

In *Riggs* v. *U. S.*, 14 F. (2) 5, (C. C. A. 4; 1926), (Cert. denied, 273 U. S. 719), the court said, per *Waddill, J.* (p. 9):

> "In the enforcement of this act much latitude must be allowed to the *district judge,* in affording the defendant the benefits thereof."

Later on in the opinion the court refers to "the judge holding *the court which* granted probation" as having continuing power over the probationer. This obviously alludes to the Trial Judge.

In the *Antinori* case, *supra,* the Court said, page 172:

> "* * * the law is designed to vest the *trial judges* with discretion. * * *"

In *Ex Parte De Angelo,* 50 F. (2) 847 (C. C. A. 6; 1931) the court said, per *Simons J.* (p. 848):

> "The Courts of Appeal of the Eighth and the Fourth Circuits have held that much latitude is allowed *District Judges* in enforcement of the Probation Act. *Reeves* v. *United States,* 35 F. (2) 323; *Riggs* v. *U. S.,* 14 F. (2) 5."

In *Jianole* v. *U. S.,* 58 F. (2) 115 (C. C. A. 8; 1932), the court said, per *Van Valkenburgh, Ch. J.* (p. 117):

> "Everything points to the purpose of the Congress to lodge a very broad discretion in the *trial judge* in the granting and revoking of probation. To require formal proceedings would be subversive of the very purpose of the act." (Italics ours.)

See also to identical effect, *U. S.* v. *Maisel*, 26 F. (2) 275, (D. C. S. D. Texas 1928) (quoted, *supra*, p. 20).

This court has laid down a guiding principle in *Burns* v. *U. S.*, 287 U. S. 216 (p. 220) (quoted *supra*, p. 35).

From the foregoing, it can be seen that both by law and by reason, the Trial Judge is the judge best fitted to determine matters arising out of the defendant's probation.

In the light of the repeated statements by the courts that the Probation Act must be liberally construed so that the probationer derives every possible legitimate advantage from it, it is respectfully urged that this court construe the Act so that it be settled beyond question, that the Trial Judge, even though he be sitting in another district, has jurisdiction to discharge the probationer from supervision and terminate the proceedings.

POINT IV.

Any venue objection that might have been raised to Judge Inch hearing the motion in his home district was waived by the government on two occasions: (1) when the motion was originally argued on its merits (R. 50, 51, 83), and (2) when the government moved to re-settle the order (R. 39).

Under *Section 725*, the only person who need be notified about the application for discharge of a defendant and for termination of the proceedings against him is the proper probation officer. In this case, he was the Probation Officer for the Southern District of New York. Here, the probation

officer for the Southern District of New York was given "due notice" of the application (R. 29), and he appeared before the Judge on the hearing, and argued on the merits against the granting of the application (R. 50, 51, 83).

Thereafter, the District Attorney for the Southern District of New York moved for re-settlement of that order (R. 39) and that motion by stipulation was heard by the Trial Judge, who was then again sitting in the Southern District. That motion was argued *on the merits,* and on that argument the District Attorney supplemented his original motion by a modified oral motion for a mere *re-settlement* of that order (R. 59). On that hearing, *the validity of the order as a proper order in the case was accepted by the District Attorney,* who said he would not even re-settle the order, (in accordance with the suggestion of the Judge that he would grant a re-settlement to insert the word "probation" ahead of the word "proceeding" so as to indicate that he meant to terminate "the probation proceedings") *"until such time as we find it necessary"* (R. 65).

Jurisdiction to hear matters of a probationary nature is given to "courts of the United States having original jurisdiction of criminal actions". (Probation Act, Sec. 724). Therefore, since Judge Inch was sitting as a Federal District Court, either of the Eastern District or the Southern District of New York, when he made the order of December 16, 1935, discharging the probationer and terminating the proceedings, there is no doubt that he did have jurisdiction over the general subject matter of probation.

Jurisdiction of the subject matter is derived by law and cannot be acquired by consent of the parties. *Egan* v. *Knewel,* 298 F. 784, revd. on other grounds 268 U. S. 442; *Wick* v. *U. S.,* 290 F. 191.

But where the court has jurisdiction over the subject matter, the parties may waive improper venue.

The distinction between jurisdiction and venue has been clearly stated in *Fribourg* v. *Pullman Co.,* 176 F. 981, where the Court quoting from Street on Federal Equity Practice, Vol. I, Secs. 383-384, said, per *Connor, J.* (p. 984):

> "If a suit is of such a nature that it can certainly be brought in some federal court, or another—that is, if the subject matter of the suit, or the character of the parties, is such that a federal court of some state or district has jurisdiction to entertain it—then the question whether that suit should be brought in one particular state, or district, rather than in another, is not a question of jurisdiction at all. It is rather a question of venue * * * The venue is a matter of personal privilege and can therefore be waived * * *"

It is well settled that failure to challenge jurisdiction of the person, or appearance, is equivalent to consent. *Chapman* v. *Scott,* 10 F. (2) 156; Affd. 10 F. (2) 690; Cert. Denied 270 U. S. 657. *Panama Ry. Co.* v. *Johnson,* 289 F. 694 Affd. 264 U. S. 375.

When the Probation Officer appeared before Judge Inch to argue against the granting of the application on its merits, and again when the District Attorney subsequently moved to resettle the order of Judge Inch discharging the probationer, each of those appearances gave to Judge Inch jurisdiction over the parties. *Therefore, since* he already had jurisdiction over the subject matter (*Sec. 724 Probation Act*), the order of discharge and termination of proceedings was a valid and effective one.

In the instant case, there is, of course, no question but that all the facts were known to the probation officer, as well as to the United States District Attorney and neither of them made any objection to Judge Inch's jurisdiction at any time.

That a United States District Attorney may waive venue is settled in *Atkins* v. *Bender,* 18 F. (2) 357. In that case an action was instituted against the collector of Internal Revenue in the Western District of Louisiana. It should have been brought in the Eastern District, the domicile of the collector. The District Attorney had made a motion extending his time to answer and it was granted. Subsequently, the District Attorney moved for dismissal of the action on

the ground that the Court of the Western District had no jurisdiction over the action. The defendant claimed that since the duty of the District Attorney was imposed by statute, he had no right to waive venue. The court said, per *Dawkins, J.* (p. 358):

> "The * * * question is more properly speaking one of venue, for undoubtedly a federal court has jurisdiction to decide such matters. If timely urged, the defendant had the right to require that the suit be brought at his domicile; but this, in my opinion, was a privilege which he might waive, the same as any other defendant sued in a personal action."

In the case of *U. S.* v. *Goldstein*, 271 F. 238, (C. C. A. 8); 1921) the same problem arose, and again the court held that venue could be waived.

Finally, in the case of *Cheeseman* v. *Hart*, 42 F. 98, a case very close to the one at bar, insofar as it involved a visiting judge who returned to his own district, and then heard a further motion in the case, it was held that any jurisdictional defects were waived by appearing and arguing the motion. In that case a judge from Missouri had been sent to Colorado by designation. After his designated term had expired, he returned to Missouri. Thereafter he entertained a motion for a new trial, and entered an order thereon in the proper district. A question was raised as to his authority to hear that motion. The law then did not grant such authority to pass on new trial motions as it does now by Section 22 of the Judicial Code. Counsel, however, had argued it before him on the merits, so that the judge should not have to travel to Colorado. In deciding the motion the court said, per *Philips, J.* (pp. 105-106):

> "Counsel for both parties having agreed to waive the necessity or burden of such a trip to me, my right to pass upon the motion must be viewed as if I had gone to Colorado, or remained there in the first instance, to hear the motion. Unpleasant as it is to act under even the imputation of assuming authority, I feel

constrained to proceed in this matter under an imperative sense of official duty."

In conclusion, it is submitted that since Judge Inch had jurisdiction over the subject matter of probation, especially as he was the Trial Judge, and since neither the Probation Officer, nor District Attorney challenged Judge Inch's jurisdiction over the parties, after appearance by both of them, such defect, if any, must be deemed to have been waived, and the order of Judge Inch was, therefore, a valid one.

POINT V.

The visiting district judge before whom the case was tried and who placed defendant on probation, had power so long as he remained a district judge, to make Chambers orders affecting that case, relating to probation.

It is well settled that probation is informal. In *Burns* v. *U. S.*, 287 U. S. 216, this Court said, per *Hughes, C. J.* (p. 220):

> "To accomplish the purpose of the statute, *an exception degree of flexibility in administration is essential. It is necessary to individualize each case,* to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." (Italics ours.)

In *Jianole* v. *U. S.*, 58 F. (2) 115 (C. C. A. 8, 1932), the court said, per *Van Valkenburgh, Ch. J.* (p. 117):

> "Everything points to the purpose of the Congress to lodge a very broad discretion in the *trial judge* in granting and revoking of probation. *To require formal proceedings would be subversive of the very purpose of the act.*" (Italics ours.)

In *Evans* v. *District Judge,* 12 F. (2) 64, page 65, (C. C. A. 6, 1926), it was expressly said that probation matters should *not* be the "subject of formal applications, hearings and orders".

Therefore, orders affecting probation may properly be made at Chambers.

Orders made at Chambers, though out of the district where they are to be effective, are valid orders.

In re Parker, 131 U. S. 221;
U. S. v. *Goldstein,* 271 F. 838 (C. C. A. 8, 1931);
Jianole v. *U. S.,* 58 F. (2) 115 (C. C. A. 8, 1932);
Apgar v. *U. S.,* 255 F. 16, p. 18;
Ex Parte Harlan, 180 F. 119, p. 129;
Dwyer v. *U. S.,* 170 F. 160;
Re Associated Gas & Elec., 83 F. (2) 734.

In the *Apgar* case, *supra,* the court said (p. 18):

> "Where the order is one which may be made at the chambers of the Judge, it *is not* necessary that it be made within the territorial limits of the district in which the order is to be effective, if it is made where the Judge at the time is performing the duties of his office."

In *McDowell* v. *U. S.,* 159 U. S. 596, the court said per *Brewer, J.* (pp. 598-9):

> "There is no constitutional provision restricting the authority of a District Judge to any particular territorial limits. District Courts are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress."

To like effect see *Gonzales* v. *Cunningham,* 164 U. S. 612, 622-35; 41 L. Ed. 572).

In the case of *U. S.* v. *Goldstein, et al.,* 271 F. 838 (C. C. A. 8, 1921), a judge of the District of Kansas was tempora-

fily assigned to the District Court for the Eastern District of Missouri, where he heard a case and entered a decree in a naturalization proceeding, wherein the defendant was declared to be a perjurer. After the term expired, the Judge returned to his own Court in Kansas. Three years later, a motion was made in that proceeding, returnable before the Judge in Kansas, notice of which was served on the District Attorney for Missouri. On the return date of the motion, both parties appeared before the Judge in Kansas and argued the matter on the merits, and moved for a continuance of the argument to another town in Kansas. No jurisdictional objections were made until the adjourned hearing, at which time the objections were overruled. After the hearing, an order was entered modifying the decree, and striking out the declaration that this particular defendant was a perjurer. The decree was then entered in the Missouri Court. On appeal, it was held that the decree was valid.

The *Goldstein* case, *supra,* was cited with approval in *Clarke* v. *Chicago, B. Q. R. Co.* (C. C. A., Wyo.; 1933), 62 F. (2) 440, page 442.

In *Dwyer* v. *U. S.*, 170, F. 160, the District Court sitting at Boise City was held to have authority to pass upon a motion for a new trial of a case which had been tried in the northern division then held at Moscow.

The general purpose of dividing the United States into judicial districts was for the convenient partition of the judicial business within the respective states.

Rosecrans v. *U. S.*, 1897, 165 U. S. 257, 41 L. Ed. 708.

The statutes effecting the division of a judicial district do not create new districts, nor establish new additional courts.

Therefore, it is submitted that there is no constitutional or legal bar which would prevent Judge Inch's order, made in Chambers in the Judge's home district from being effective in the district where the case was tried.

POINT VI.

The order of December 16, 1935, having been captioned in the "Southern District of New York" and duly entered in the "Southern District of New York", and being unvacated and un-appealed from, must be conclusively presumed valid.

It will be observed that the order of December 16, 1935 is properly captioned in the Southern District of New York (R. 28). It is also to be observed that this order was duly entered and filed in the Southern District of New York (R. 107), and that it is on file with the court (R. 107). No appeal has been taken from the order. The order has not been vacated, and though a motion was made to re-settle the order, it has not been re-settled.

It is also observed that the recitals of that order, contain the following words (R. 29):

> "* * * and due notice having been given to the Hon. E. Fred Sweet, Probation Officer for the Southern District of New York, and due deliberation having been had thereon."

In the case of *The Alaska,* 35 F. 555 (C. C. S. D.), an action pending in the Southern District of New York, was tried by consent, in the Eastern District, with another action that was pending there. Thereafter, a decree was made in the Southern District action, captioned in the Southern District, and duly entered and filed in the Southern District, though it was actually made and signed by the trial Judge while sitting in the Eastern District. It was there claimed that the decree was void, because the judge, sitting in the Eastern District, had no jurisdiction to hear the case, or to grant the decree. In holding the decree valid, the circuit court said, per *Blatchford, J.* (p. 557):

> "The decree of the district court for the Southern district in the present case appears on its face to have been made at a stated term of that court held within the limits of that district. * * * The record discloses no application to set aside the decree because such was not the fact, and it must be conclusively presumed that it was the fact, in view of the provisions of Sections 591-596 and 600 of the Revised Statutes [now equivalent to Title 28, Section 17 et seq. of the U. S. Judicial Code] under which Judge Benedict [of the Eastern District] could have been designated and empowered to hold the district court for the Southern district.

In *Clarke* v. *Chicago, B. & Q. Ry. Co.*, 62 F. (2) 440, 441 (C. C. A. Cert. denied 290 U. S. 629), where a visiting judge signed an order in an action, after he had returned to his own district, which order was captioned and entered in the original district, it was contested for lack of jurisdiction of the judge to make the order, but the court held,

> "The presumption is that the order was regularly and legally made *(The Alaska)*."

In *McDowell* v. *U. S.*, 159 U. S. 596, this court said, per *Brewer, J.* (p. 601):

> "Any defect in the order, if defect there was, is shown only by matters dehors the record."

To like effect see

U. S. v. *Goldstein*, 271 Fed. 838 (C. C. A. 8; 1931);
Columbus Chain v. *Standard Chain Co.*, 145 F. 186.

POINT VII.

At most, it can only be claimed that the order of December 16, 1935 was irregular, so it remains in full force and effect until vacated, which was never done.

Since Judge Inch had jurisdiction over the general subject matter of probationary proceedings (See Point III, *supra,* p. 33), it cannot be said in this case that Judge Inch's order was void for lack of jurisdiction. At most, the proceeding may have been irregular, insofar as the hearing, though held in chambers, may have been heard in the wrong district, and that, therefore, it was irregular as a matter of venue. Thus, at most, this order was merely irregular and not void, and the only way in which its validity could have been assailed was by a notice of motion to set aside the purported irregular order.

29 Cyc. 1522:

"An order *irregularly obtained is operative* until vacated."

See also

Parker Bros. v. *Fagan,* 68 Fed. (2) 616.

The only way this order was attacked was by moving to *resettle* the order, *not* to vacate it. Thereby, its validity as an order in this proceeding was recognized. In any event, it has *not* been vacated, nor even resettled, so it is "operative."

POINT VIII.

As the warrant was for violation of probation, and not for sentence, and as there was no probation to violate, the writ was properly sustained.

The Government's claim, that under *Section 725*, the defendant could be brought in for sentence, after the sentence period had expired, during the longest time for which the defendant could have been sentenced, is without merit, because the warrant here issued was not to bring the defendont in *for sentence*, but to charge the defendant with having allegedly *"violated one of the terms of his probation"* (R. 32), and the petition therefor specifically so charges (R. 34).

As has been seen, even if the criminal proceeding itself is not deemed terminated, at the very least, both the sentence probation period as well as the statutory probation period were terminated by the order of December 16, 1935 (see Point I, *supra*).

There being no probation of any kind open, which the defendant could have violated, had he done anything wrong, the warrant was improperly issued, and the Writ of Habeas Corpus was properly sustained.

If the defendant did anything wrong, he may be tried on that crime separately, as to which there is not even an indictment.

POINT IX.

The defendant may not now be sentenced on two of three indictments on which conditional probation was imposed, where sentence was imposed on the third indictment and under which the sentence was served and the fine paid.

The Circuit Court of Appeals is in error in distinguishing the instant case from *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2, 1936). In *United States* v. *Greenhaus, supra,* cert. den. November 17, 1936, the Circuit Court held that where there are sentences upon several counts in a single indictment, the suspension of sentence to begin at termination of a prior one is unlawful, and hence an order of probation is invalid and execution of the sentence may be ordered. The opinion in the case at bar, decided May 10, 1937, held that "that rule does not apply to indictments which are separate and not consolidated", and the defendant was remanded for the consideration of the revocation of his probation and for sentence under the Probation Act (Sec. 725, Title 18, U. S. C.).

The distinction made between counts in a single indictment in *United States* v. *Greenhaus, supra,* and separate indictments in the instant case is not supported by the weight of authority. *Riggs* v. *United States,* 14 F. (2d) 5 (C. C. A. 4, 1926); *Freeman* v. *United States,* 227 Fed. 732, 740 (C. C. A. 2, 1915; *United States ex rel. Mignozzi* v. *Day,* 51 F. (2d) 1019 (C. C. A. 2, 1931); *Gillespie* v. *Walker,* 296 Fed. 330 (C. C. A. 4, 1924); Cf. *Vimmick* v. *Tompkins,* 194 U. S. 540; *In re De Bara,* 179 U. S. 316; *In re Henry,* 123 U. S. 372.

The three indictments here to which pleas of guilty were entered simultaneously arose out of the same series of transactions. They could have been consolidated under Section 557 of Title 18 U. S. C.

Under the second opinion of *United States* v. *Greenhaus*, decided April 20, 1937, the Court is limited to recommitting the defendant to serve the sentence *originally imposed.* In the case at bar, however, no sentence had been imposed on March 26, 1934 on two of the indictments.* and a proper sentence of two years and a fine of $1,000 was imposed on C 96-160. *Therefore, the complete sentence imposed on that date was served,* and it is now too late for the government to say that sentence should be changed after it has exacted the full penalties thereon from the defendant. To do so would be to punish the defendant twice for the same offense and doubly jeopardize him..

Furthermore, the sentence cannot be changed after the term in which it has been imposed has expired. *Santos* v. *Esola,* 50 F. (2d) 516; *Gillespie* v. *Walker, supra, Ex Parte Lange,* 18 Wall. 163, 167 (1873). Certainly not after sentence was served. Not even, where a part of the sentence which was imposed is illegal, for in that event, the legal part is the sentence and the excess is void. *Ex Parte Lange, supra,* In effect, the government is now seeking to change the sentence, by enlarging it.

This decision is in direct conflict with an opinion of the 10th Circuit; *White* v. *Burke,* 43 F. (2d) 329 (C. C. A. 10, 1930), which held that the District Court is without power to suspend a part of a sentence on the condition that defendant serve another part thereof.

It is significant to observe, in this regard, that the Government's brief below was inconsistent. Though in its Point I, the Government said that the suspension of imposition of sentence and the granting of probation under indictments C96-120 and C80-944 "were void in law," because of the *Greenhaus* decision (Aplt.'s Br., p. 8), in Point IV, the Govern-

* The difference in effect between the suspension of imposition of sentence and of suspension of execution on a sentence imposed is well settled, *United States* v. *Murray,* 275 U. S. 347; *Kriebel* v. *United States,* 10 F. (2d) 762; *United States* v. *Lecato,* 29 F. (2d) 694; 36 Op. Atty. Gen., 189; *State* v. *Liliopoulos,* 165 Wash. 197, 5 Pac. (2d) 319.

ment argued that the *Greenhaus* decision was itself wrong, citing numerous cases in support of that contention, and concluding as follows (p. 44):

> "Therefore U. S. v. Greenhaus, supra, is not supported by the weight of authority, *and the complete sentence imposed upon the defendant-appellee was a valid sentence.*"

So that if the principle of the *Greenhaus* decision is adhered to, its ruling would not apply here, because the facts here differ, no unserved sentence existing under the other two indictments. If, on the other hand, those principles of the *Greenhaus* case are not adhered to, because they are not in line with existing authority as claimed by the Government, then the suspension of imposition of sentence and granting of probation by the trial court, certainly was, as the Government conceded, correct and valid.

POINT X.

The application to have the court designate a place of incarceration, in which the defendant should serve a purported "unserved portion" of his alleged sentence, was properly denied, because no sentence was imposed upon the defendant on the two indictments involved, but, on the contrary, in both of those matters the imposition of sentence had been suspended.

The motion made by the Government on December 22, returnable December 28 (R. 117) was *not* a motion to sentence the defendant, but the petition therefor of Assistant District Attorney Shears expressly asked that:

> "* * * an order issue committing this defendant for the period of the unserved portion of his sentence of March 26, 1934, to wit, four years in a place to be des-

ignated by the Attorney General of the United States * * *" (R. 121).

There had been no sentence imposed on the defendant under either of the indictments to which that motion relates, namely, C 80-944 and C 96-120 (R. 117). The defendant had been put on probation for four years when the imposition of sentence was suspended. That is not at all the same as sentencing him to four years imprisonment.

A notice to sentence the defendant had been served upon both the defendant (R. 40) and his surety (R. 41), *but that application was never pressed.*

There having been no sentence imposed, *there was not any sentence under which the alleged "unserved portion" thereof could be served,* and the motion to have the court direct the defendant's commitment, for the alleged "unserved portion" of the non-existing sentence was properly denied.

CONCLUSION.

The orders of the Circuit Court of Appeals should be reversed and the orders of the District Court should be reinstated.

Respectfully submitted,

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Of Counsel on the Brief.

APPENDIX.

Title 28 U. S. C. *Judicial Code, Section 22,* provides as follows:

> *"Any designated and assigned judge* who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, *to decide all matters which have been submitted to him within such district,* to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation Mar. 3, 1911, c. 231 §18, 36 Stat. 1089; Oct. 3, 1913, c. 18, 38 Stat. 203; Sept. 14, 1922, c. 306; §5, 42 Stat. 839)." (Italics ours.)

Title 28 U. S. C. *Judicial Code, Section 23,* provides as follows:

> *"Same; duty of district or circuit judge.* It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 or this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district. (R. S. §595; March 3, 1911, c. 231, §19, 36 Stat. 1090.)"

Probation Act. (Act March 4, 1925, c. 521, as Amended June 6, 1930, c. 406 and June 16, 1933, c. 97; U. S. C. Title 18, Secs. 724-725).

Sec. 724: *Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation or modification of probation; duties of probationer.* The courts of the United States having original jurisdiction of criminal actions, except in the District Court of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. This period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

Sec. 725. *Same; powers of probation officers; arrest of probationer.* When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The Court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, it may extend the probation as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest which

warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. *Thereupon such probationer shall forthwith* be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

Sec. 726. *Same; probation officers; appointment, etc.*—The judge of any United States court having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the discretion of the judge making such appointment or of his successor. All such probation officers shall serve without compensation except that in case it shall appear to any such judge that the needs of the service require that there should be a salaried probation officer, such judge may appoint one such officer and shall fix the salary of such officer subject to the approval of the Attorney General in each case. Probation officers who are to receive salaries shall be appointed after competitive examination held in accordance with the laws and regulations of the civil service of the United States. Such judge may in his discretion remove any probation officer serving in his court. The appointment of probation officers shall be in writing and shall be entered on the records of the court of the judge making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed. Such court may allow any probation officer his actual expenses necessarily incurred in the performance of his duties. Such salary and expenses when duly approved

shall be paid from the appropriations for courts in which such officer serves. (Mar. 4, 1925, c. 521, sec. 3, 43 Stat. 1260.)

Sec. 727. *Same; duties of probation officers.*—It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such report to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (Mar. 4, 1925, c. 521, Sec. 4, 43 Stat. 1260.)

Sec. 728. *Duties of Attorney General affecting Probation officers, investigations, collection of information, record, forms and statutes, rules, enforcement of laws, annual report.* The Attorney General or his authorized agent shall investigate the work of the Probation Officers and make recommendations concerning the same to the respective Judges and shall have access to the records of all Probation Officers. He shall collect for publication statistical and other information concerning the work of the Probation Officers. He shall prescribe record forms, and statistics to be kept by the Probation Officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the pro-

bation system and the enforcement of the Probation Law in all U. S. Courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts. (Mar. 4, 1925, Chap. 521, Sec. 4 as added June 6, 1930 Chap. 406, Sec. 2 also in 46 Stat. 503. See note to Section 726.)

Sec. 557. *Same; Joinder of charges.* When there are several charges against any person for the same act or transaction; for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in several counts and if two or more indictments are found in such case, the court may order them to be consolidated. Revised Statutes, Section 1024.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 87

WILLIAM D. FRAD,

Relator-Appellant,

against

JOHN J. KELLY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES OF AMERICA,

Appellee.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF WILLIAM D. FRAD, APPELLANT.

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Summary of Argument.

Respondent has not disputed that the order of December 16, 1935 is valid and enforcible, because (a) it is properly captioned and properly filed, and still remains a valid order of the Southern District Federal Court, since it is unva-

cated and has *not* been appealed; (b) the question of the proper venue of the hearing on the application, leading to the order of December 16, 1935, if questionable, was waived when the Probation Officer appeared on the return day in the Eastern District, and argued the matter on its merits, without challenging Judge Inch's jurisdiction to hear the motion while sitting in the Eastern District; (c) any defect in venue was waived by the District Attorney (1) by moving in the Southern District to resettle the order, (2) by arguing that motion on its merits, and then, (3) by agreeing to let the order stand as it is.

The law is settled that a public officer may waive a defect in venue, and may even do so by appearing in a proceeding in a district other than the one in which he is appointed to serve. While the law specifies the duties of a Probation Officer and District Attorney, it does not limit the place, time, or manner in which those duties are to be performed.

Furthermore, no case has been cited by Respondent which holds that a Trial Judge is deprived of concurrent jurisdiction with Judges subsequently sitting in the Trial Court, to terminate a proceeding, where a defendant had originally been placed on probation by the Trial Judge after imposition of sentence had been suspended. For such an order, terminating the proceedings and discharging the probationer from further supervision, is a final disposition of a "matter" that had been submitted to the visiting Trial Judge within the meaning of Section 18 of the Judicial Code, and which "matter" had been left open. That "matter" was the sentencing of the defendant on his plea of guilty.

As the Probation Act expressly and concededly permits a judge to enter an order fully discharging a probationer and finally terminating the proceedings, and as the order of December 16, 1935 is literally phrased in the language of

the Act, all proceedings against the Petitioner were terminated and he was fully discharged.

Whatever disposition this Court will make of the *Greenhaus* case principle, the writ of Habeas Corpus must be sustained. If the *Greenhaus* case principle is sustained, then the original probation order on the second and third indictments was void, so the Petitioner cannot now be accused of violating an *invalid* probation order; furthermore he has already fully served the valid portion of the sentence imposed upon him. If the *Greenhaus* case principle is not sustained, then, of course, the original probation order here was valid, and Petitioner could properly be discharged from the effects thereof, as was intended by the order of December 16, 1935.

POINT I.

The Order of December 16, 1935, is Valid and Binding.

A.

The Respondent does not dispute, or even attempt to distinguish, the cases cited by Petitioner, which hold that an order must be deemed valid, an denforced, regardless of any other reasons, if it is properly captioned and filed in the court where the action is pending, and if that order remains unvacated.

In the case at bar, the order of December 16, 1935 was captioned Southern District of New York, was duly entered in the Clerk's Office of that Court, and still remains on file there, unvacated and unappealed from, and, therefore, it must be recognized and enforced as a valid order. (See Point VI of Petitioner's Main Brief.)

B.

The Respondent has not attempted to answer the Petitioner's argument that the Probation Officer of the Southern

District should have objected to the venue, if there was any venue question, at the time Judge Inch heard the application for discharge and termination of the proceeding in chambers in the Eastern District, and, by failing to so object, and in arguing the matter on its merits, acquiesced in the right of Judge Inch to hear the application there, even though he was sitting in the Eastern District. (This question is fully discussed in Point IV of Petitioner's Main Brief.)

The only answer by the Respondent is indirect. In its brief, Point II (3), Respondent cites *R. S. 771, 28 U. S. C. Section 485* in support of its contention that neither the District Attorney, nor the Probation Officer, had any power to represent the United States in a matter outside of the district for which they were appointed.

There are two cases which expressly contradict the Respondent's contention, and which hold that public officers may validly represent the Federal Government in districts other than those for which they are appointed, for *that section merely specifies what their duties are to be, and not when, where or how they are to perform those duties.*

Atkins v. *Bender* (D. C. La. 1927), 18 F. (2d) 357 (discussed in Point IV of Petitioner's Main Brief, p. 42) directly holds that *R. S. 771, 28 U. S. C. Sec. 485* does *not* limit the power of the District Attorney, or direct how his duty shall be performed, and does *not* prevent him from waiving objections to citation, or to jurisdiction of a particular District Court to hear the matter, which is an objection only of venue, and not to jurisdictional power.

And in *U. S.* v. *Goldstein*, 271 Fed. 838, the original action was tried in the Eastern District of Missouri. Judge Pollock of Kansas had been temporarily assigned to sit in the Eastern District. He heard the particular matter in controversy, entered his final decree in the Missouri Court, and returned to Kansas. Three years later, an application to

modify that decree was made to Judge Pollock in Kansas. The opinion there states what then happened (p. 841):

> "Notice of the application to be made to Judge Pollock on September 21, 1918, at Kansas City, Kan. was duly served on the District Attorney for the *Eastern District of Missouri* and the Chief Naturalization Examiner of the United States. On that day the parties appeared before Judge Pollock at *Kansas City, Kan.* and on motion of the solicitors for Appellant the hearing was continued until September 26, 1918, *at Wichita, Kan.*, in order to give them an opportunity for investigation of the facts. *No objections were made by appellant at that time.* At the hearing at Wichita, the United States for the first time objected to the jurisdiction of Judge Pollock to hear the motion in Kansas. * * *" (Emphasis ours.)

The Circuit Court of Appeals held that the revised decree of Judge Pollock, which eliminated important provisions, was *valid*, stating, as to the fact of waiver by the District Attorney:

> "It is also proper to state in this connection that, when the motion was first presented to Judge Pollock, at Kansas City, Kan., no objection to his hearing it in the State of Kansas was made by the solicitors for the appellant."

C.

In connection with Respondent's argument that the District Attorney had no power to appear in a district other than the one for which he was appointed, it is important to note that this argument is, at most, academic here. The District Attorney's acquiescence in the validity of Judge Inch's order of December 16, 1935, is indicated by his affirmative *acts which took place only in the Southern District of New York.*

The District Attorney for the Southern District of New York moved for *re-settlement and not to set aside*, the order

of December 16, 1935, which motion was made returnable in the Southern District. That motion was argued there *on the merits*, and the order was there accepted by him as valid, in so far as Judge Inch's jurisdiction to make it was concerned. He only argued for a change of language of the order. The court granted that application and he agreed that even this change would not be made "until such time as we find it necessary" (R. 65). In other words, there was a complete acceptance by him that the order of December 16, 1935, *as it now stands*, was a valid exercise of judicial power by Judge Inch, but he merely questioned the contents, which point he later abandoned—at least temporarily for this motion.

Therefore, his acts, all of which took place in the Southern District, are sufficient to constitute a waiver of any defect in venue, and also constitute an acquiescence in the jurisdiction of Judge Inch to make the order of December 16, 1935.

D.

The foregoing considerations, in themselves, show that the order of December 16, 1935, must be deemed valid and enforced, even if Judge Inch sitting in the Eastern District in chambers had no jurisdiction to hear the motion.

Yet none of Respondent's cases hold that the trial or sentencing judge does not have *concurrent jurisdiction*, after the trial, with a subsequently sitting judge of the trial court, in relation to probation, where imposition of sentence was suspended.

The only case urged by Respondent to support its contention that a judge of the trial court has exclusive jurisdiction over the probationer is *Grant* v. *Guernsey* (63 F. (2) 163 C. C. A. 10), cited in Point II (3) of Respondent's brief. That case, however, has nothing to do with the point. In that case, a *Federal* Court placed the defendant on proba-

tion. Thereafter he was arrested by a *State officer* for a state crime, which he had committed prior to the crime for which he had been tried in the Federal Court. The defendant sued out a writ of Habeas Corpus, and the court naturally held that, since the defendant was under the jurisdiction of the *Federal Courts,* the warrant for the arrest of the defendant issued by a State court was a direct interference with Federal jurisdiction, and violated comity between Federal and State courts. It did *not* involve or even consider the point here presented that a sentencing judge of the Federal Trial Court shares concurrent jurisdiction with a subsequently sitting Federal judge of the same court over a probationer whom the original sentencing judge had placed on probation.

As a matter of fact, in Point II (2), Respondent admits that

> "probation may be granted (*Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d) or revoked (*United States* v. *Greenhaus,* 14 F. Supp. 268 (S. D. N. Y.) *by any judge of the trial court and not solely by the judge who imposed the sentence.*" (Emphasis ours.)

With this statement, Petitioner agrees, and also respectfully submits that the concurrent jurisdiction of the trial judge continues, even when the trial judge returns to his home district. (See discussion of this in Point III of Petitioner's Main Brief.)

So that Judge Inch had jurisdiction to make the order.

From any point of view, the order is valid and enforceable.

Point II.

The Judicial Code, Section 18, as Amended, Granting to a Visiting Judge, Who Returns to His Own District, the Power "To Decide All Matters Which Have Been Submitted to Him Within Such District", is Applicable to the Order of December 16, 1935.

The Respondent argues in Point II (2) of its Brief, that Judge Inch's order of December 16th, 1935, discharging the Petitioner from further probationary supervision and terminating the proceedings was not related to any "matter", which had been submitted to Judge Inch when he was sitting in the Southern District of New York, but was a "new matter", and hence did not come within *Judicial Code, Section 18.*

The tenuousness of such an argument is apparent on its face. The matter submitted to Judge Inch, when he was sitting in the Southern District, on the Petitioner's plea of guilty, was the sentencing of the Petitioner. Judge Inch did not finally dispose of this matter at that time, but held it in abeyance, by suspending the imposition of sentence on two of the indictments, meantime placing him on probation. This same *matter*, that is, relating to the sentencing of the Petitioner, was again brought before Judge Inch when he was sitting in the Eastern District. This time, the Petitioner asked that a final disposition be made of the matter which had been submitted to Judge Inch in the Southern District, and that the threat of a future sentence be removed, by an order discharging him from probationary supervision and terminating the proceedings.

Now it may be true that in support of this application, the Petitioner presented certain "*new facts*" concerning his health, which had not been before Judge Inch at the time he was sitting in the Southern District. But this is far

different from the argument made by the Respondent in its brief, that the order terminating the proceedings against the Petitioner was a disposition of a "new matter" which had no relation to any matter submitted to Judge Inch when he was acting as a judge in the Southern District of New York.

He merely made final disposition of the "matter" which had originally been submitted to him in the Southern District, by discharging the Petitioner from further probationary supervision and terminating the proceedings against him. (See Appellant's Main Brief, Point II, p. 25ff.)

The suspension of the imposition of sentence; the placing of the Petitioner on probation; the discharge of the Petitioner from further probationary supervision, and the termination of proceedings, *were all inseparably connected to each other as flowing from the same matter—the matter of sentencing the Petitioner.* In connection with the close relationship between the suspension of the imposition of sentence and probation, it should be observed that suspension of the imposition of sentence is not authorized, unless the defendant is at the same time placed on probation (*Sec. 724 Probation Act; Ex Parte De Angelo 50 F. (2) 847, 848 (C. C. A. 6th).*

The link between placing a defendant on probation and discharging him from probation is self evident. In both instances, the judge's decision is based on the conduct of the defendant, past and present, and if certain "new facts" are brought to the attention of the judge, they do not change the nature of the "matter", which still remains the same, namely, whether the probationer's conduct merits clemency instead of punishment.

Cases holding that the *trial judge* is generally the preferable judge, and has jurisdiction to grant such relief even though a sitting judge of the trial court might also do so,

have already been discussed. (Point III of Appellant's Main Brief.)

Respondent further urges that the validity of orders made by a temporarily designated judge, after his departure from the district wherein he heard and tried these cases is a "purely incidental and supplementary" form of "permissible judicial acts". (Point II [1]). That is just what is claimed by Petitioner in the instant case. Judge Inch's order of December 16, 1935, was "*purely incidental and supplementary*" to his original order suspending the imposition of sentence, and placing the Petitioner on probation.

The case of *U. S.* v. *Goldstein*, 271 Fed. 838 is analogous to the instant case, and is one of those mentioned by Respondent as involving orders "purely incidental and supplementary" to other orders entered by the temporarily assigned judge.

In the *Goldstein* case, three years after a judge returned to his home district, he heard an application in his home district to modify a decree made by him while he was sitting as an assigned judge in another district. He made an order, while in his home district, modifying the first decree, and that decree was then entered in the court in which the action had originally been instituted. That order was held valid. The situation at bar, in effect, is precisely the same. Judge Inch's order of December 16, 1935, supplements the first order made by him while in the Southern District, by *finally disposing of a matter which the first order had left open.*

In that sense, it is respectfully submitted, that it may fairly be said that the order of December 16, 1935 was "purely incidental and supplementary" to the original order suspending sentence and placing the petitioner on probation, and, therefore, one of the "permissible judicial

acts" of a temporarily assigned judge, who enters an order after he has returned to his own district affecting a proceeding in the district to which he had been temporarily assigned.

The order of December 16, 1935, even though made in the Eastern District, was, therefore, a proper disposition of "a matter" which had been submitted to Judge Inch while he was acting as a judge for the Southern District of New York.

POINT III.

The Effect of the Order of December 16, 1935, was to Completely Terminate the Proceedings Against the Petitioner and to Terminate the Court's Jurisdiction Over Him in Relation to All Matters Pertaining Thereto.

The Respondent, in Point III of its brief, concedes that *Section 725* of the Probation Act

> "may be given the broader construction which would permit the trial court to terminate the entire proceedings so completely that no further action could be taken against the defendant. *United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5th), *United States* v. *Maisel*, 26 F. (2d) 275, (S. D. Texas)."

But the Respondent argues that the order of December 16, 1935, does not refer to "all" proceedings, or the "entire" proceedings, but only terminates "the proceedings".

The order as it is now entered in the Clerk's Office of the Southern District reads as follows:

> "• • • the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

This means not only that the Petitioner was discharged from probationary supervision *but that in addition*, "the proceedings against him in this cause" were terminated.

That certainly means "all" or "entire", because it does not limit the termination to a mere portion of "the proceedings."

The language of that order is the verbatim language of *Section 725* of the Probation Act, which expressly empowers a judge to make the disposition which was made by Judge Inch by virtue of the order of December 16, 1935. The Act says:

> "The Court may thereupon discharge the probationer from further supervision and may terminate *the proceedings* against him." (Emphasis ours.)

The order does no more than literally incorporate the language of the act. Whatever effect that order has must be determined by the effect of the wording of the act. And the Respondent has admitted that the *Antinori* and *Maisel* cases, cited *supra*, have already held that the above language of the act may be construed to mean that a judge may make an order completely dismissing the court's jurisdiction over a defendant. That is precisely the situation here, and that is the effect which must be given to the order of December 16, 1935.

Point IV.

Regardless of the Validity of the Order Suspending Sentence on the Second and Third Indictments, and Granting Probation to Begin After the Sentence Imposed on the First Indictment, the Petitioner Herein Cannot Now be Re-Sentenced, Because He Has Already Served the Valid Portion of the Sentence Imposed on Him, and Which Related to the First Indictment.

In the case of *United States* v. *Greenhaus*, 85 F. (2) 723, discussed by Respondent in Point I of its brief, a situation existed which does not exist in the case at bar. In the *Green-*

haus case, *sentence was actually imposed* on all the counts in that indictment, but execution of those sentences was suspended. In the instant case, sentence was at no time imposed on the second and third indictments.

If the suspension of the imposition of the sentences on the second and third indictments, and the placing of Petitioner on probation in the case at bar, was invalid, because this was coupled with a sentence of imprisonment, the bad part falls, and only the valid part stands, and that part has already been served. This Court has already decided that where a part of the sentence imposed on a defendant was illegal, and the remainder valid, the legal part becomes the whole sentence, and the invalid portion must be disregarded. *Ex Parte Lange*, 18 Wall. 163, 167.

And in *Hammers* v. *U. S.* (C. C. A. 5th) 279 Fed. 265, 266-7, the court said that a court may lose "jurisdiction to resentence as a result of a previous imposition of *a valid punishment, to which,* in whole or *in part,* the convict was subjected", for in that situation the man would be "punished twice for the same offense." (Emphasis ours.)

Applying that reasoning to the case at bar, it becomes apparent that, even if it were held that placing the Petitioner upon probation was invalid when joined with a sentence of imprisonment, which is the rule of the *Greenhaus* case, the latter sentence was valid, and since it was served in full by the Petitioner, the alleged invalid probationary portion must be disregarded, as mere surplusage, and the thousand dollar fine, which was paid, and the two year sentence which was imposed and served, must be deemed to be the complete sentence of the case.

Moreover, if the probationary portion of that sentence was invalid, then Petitioner cannot now be charged with a probation violation. And that is the only charge which has been brought against the Petitioner in this case.

In summary then, if the reasoning in the *Greenhaus* case does *not* apply to our case, then the probationary provision herein was valid, and the defendant was, thereafter, properly discharged and the proceedings against him terminated by virtue of the order of December 16, 1935.

If on the other hand, the reasoning in the *Greenhaus* case does apply to the facts in the case at bar, then the probationary portion of the sentence was invalid, and the sentence of imprisonment, and fine, which was valid, becomes *the complete sentence of the case, and since* the Petitioner did serve that sentence, he cannot now be brought into court to face charges of violating an *invalid* probationary order.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 87

WILLIAM D. FRAD, PETITIONER

v.

JOHN J. KELLY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court appears at R. 129–131. The opinion of the Circuit Court of Appeals (R. 151–155) is reported in 89 F. (2d) 866.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 17, 1937 (R. 155–156). The petition for a writ of certiorari was filed May 27, 1937, and granted June 1, 1937 (R. 157). The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a trial court may suspend imposition of sentences on pleas of guilty to two indictments and place the defendant on probation to take effect after service of a sentence of imprisonment on a third indictment.

2. Whether the district judge, appointed in another district but assigned and designated to sit in the trial district, who suspended imposition of sentence and granted probation, has the power, after returning to his own district and after his designation has expired, to discharge the probationer from further custody and to terminate the proceedings.

3. Whether the order discharging petitioner from further supervision, assuming validity of the order, released petitioner from the jurisdiction of the district court to impose sentences on the two indictments on which sentence was suspended.

4. Whether a judge of the trial district now has power, on motion of the United States Attorney, to revoke probation if the facts warrant it and to impose sentence on the two indictments on which imposition of sentence was suspended.

STATUTES AND TABLE INVOLVED

The pertinent statutes are printed in the Appendix to the Petitioner's brief. The table of types of sentences referred to in this brief is printed in the Appendix, pp. 30–31.

STATEMENT

On March 7, 1934, in the District Court for the Southern District of New York, the petitioner entered a plea of not guilty (R. 19) to an indictment, C–96–120 (R. 15) charging impersonation when entering the United States (U. S. C., Title 8, Sec. 220 (b)). Prior to that time, on February 6, and February 28 of the same year, he had entered similar pleas (R. 8, 13) to two other indictments, C–80–944 (R. 4) and C–96–116 (R. 9), which charged the use of passports obtained by false statements as to identity (U. S. C., Title 22, Secs. 220, 221) and conspiracy to violate laws of the United States (U. S. C., Title 18, Sec. 88).

On March 21, 1934, these pleas were withdrawn and pleas of guilty entered to all three indictments (R. 8, 13, 19) before District Judge Inch of the Eastern District of New York, who by special assignment was then sitting in the Southern District. On March 26, 1934, on indictment C–96–116 he imposed a sentence of two years imprisonment and a fine of $1,000 (R. 14), but suspended imposition of sentence on the other two indictments and placed the petitioner on probation for a period of

four years to begin after service of the two-year term on the first indictment (R. 8, 19).

On November 7, 1935, the petitioner was discharged from the penitentiary in which he served the sentence on the first indictment (R. 38) and entered on his term of probation on November 15, 1935 (R. 25–26). On December 16, 1935, Judge Inch, having returned to his home district, considered at his chambers in the Eastern District an application of the petitioner requesting termination of probation, and there signed an order as follows (R. 29):

> *Ordered*, That the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated.

This order bore the caption "United States District Court, Southern District of New York," but it appears both from the notice of the motion for the order (R. 27) and from a subsequent hearing on a motion to vacate such order (R. 42, 44) that the order was made in the Eastern District. This fact was recognized by the court below (R. 152) and is admitted by the petitioner (Br., p. 5).

On November 20, 1936, an order for issuance of a warrant was signed by a judge of the Southern

District of New York to apprehend the petitioner for violation of terms of his probation and charging him with larceny by trick on the high seas (R. 32). He was arrested and a motion was made to vacate the order of December 16, 1935, which purported to terminate probation (R. 35, 42). Judge Inch returned to the Southern District of New York to hear this motion by stipulation of counsel. No order was entered on this motion, inasmuch as the petitioner had, in the meantime, petitioned for a writ of habeas corpus (R. 66), and the United States Attorney had moved before a judge sitting in the Southern District of New York for sentence on the two indictments under which probation had been granted (R. 40, 125). The Marshal filed a return to the writ (R. 74) and petitioner traversed the return (R. 77). The Government's motion to sentence the petitioner, and the latter's petition for a writ of habeas corpus, were considered together by District Judge Bondy, of the Southern District of New York. He denied the Government's motion and sustained the writ (R. 129-131, 133, 137). Upon appeal, the Circuit Court of Appeals for the Second Circuit reversed both orders and remanded the petitioner "for consideration of the revocation of his probation and for sentence if warranted" (R. 155). This Court granted certiorari (R. 157).

SUMMARY OF ARGUMENT

The order suspending imposition of sentence on the two indictments and granting probation to be-

gin at expiration of sentence of imprisonment on the third indictment is valid. Nothing in the language or purpose of the Probation Act prohibits this practice which is used generally by the district courts and achieves the required flexible administration of the Probation Act.

The assigned judge who granted probation had no jurisdiction, after his designation expired and he returned to his own district, to revoke the order of probation and discharge the petitioner from the jurisdiction of the trial court under the Probation Act. Discharge of the probationer was a new proceeding wholly different from the proceeding in which probation was granted and was not a matter submitted to the assigned judge in the trial district.

Assuming, *arguendo,* the jurisdiction of the trial judge to revoke the probation he had granted, the order of revocation would not release the probationer from the jurisdiction of the trial court.

Even assuming that the order of probation is invalid, it was the duty of the district court to impose sentences on the second and third indictments upon which imposition of sentences had been suspended.

ARGUMENT

The court below held that the order of probation was valid, and that the assigned judge who made the order of probation had no power, after his designation expired and he returned to his own district, to discharge the petitioner from further

supervision. Therefore, the judgment of the court below reversed the order sustaining the petitioner's writ of habeas corpus and also reversed the order denying the Government's motion to revoke probation and to impose sentences on the second and third indictments and remanded the petitioner to custody for consideration of revocation of probation and sentence if wararnted (R. 155).

The petition for a writ of certiorari (p. 13) specified as error the reversal of both orders of the district court by the court below. The petitioner contends in his brief that the assigned judge, even after he returned to his own district and after his designation expired, retained the power under the Probation Act to discharge the respondent from further supervision. The petitioner also contends in his brief that the trial court retains no power to impose sentences on the second and third indictments at the present time because the sentence on the first indictment has been served.

Determination of whether the court below correctly held that probation may be revoked at the present time and sentences imposed on the second and third indictments requires a decision on the validity of the order of probation. If valid, the power of the assigned judge, after his designation expired and he returned to his own district, to discharge the petitioner from further supervision under the Probation Act must be determined. If the order of probation is not valid, the power and

duty of the trial court at the present time to impose sentences on the second and third indictments must be determined. This last question should also be determined even if the order of probation is valid, because if probation is revoked for violation of its conditions on the application which the Government has made, the power to impose sentences on the second and third indictments must be determined.

I

THE ORDER SUSPENDING IMPOSITION OF SENTENCES ON THE SECOND AND THIRD INDICTMENTS AND GRANTING PROBATION TO BEGIN AFTER SERVING THE SENTENCE IMPOSED ON THE FIRST INDICTMENT WAS VALID

The words as well as the ends and aims of the Probation Act, in which are found its meaning, *Escoe* v. *Zerbst,* 295 U. S. 490, 493, support the conclusion that the trial court has power to suspend imposition of sentence on one indictment and to grant probation to begin after serving sentence on another indictment.

1. The language of the Act grants a broad discretion and authority to the trial court. *Burns* v. *United States,* 287 U. S. 216, 220–221. Section 1 provides that when it shall appear to the trial court's "satisfaction" that the "ends of justice" and the "*best interests*" *of the* public and the defendant will be served thereby, the power exists, after conviction or a plea of guilty or *nolo contendere* for any offense not punishable by death or life imprisonment, to suspend either imposition or

execution of sentence and to place the defendant on probation "for such period and upon such terms and conditions" as the trial court "may deem best"; or the court may impose a fine and may also place the defendant upon probation. The court may revoke or modify any condition of probation, provided the entire period of probation is not more than five years.

Section 2 provides that, even after the expiration of the probation period but within the maximum time for which the defendant might have been sentenced originally, the suspension of sentence may be revoked and any sentence may be imposed which originally might have been imposed.

Language better calculated to grant broad discretion and authority could not have been chosen. The only limitations in the language granting the power of probation are that it shall not apply to offenses punishable by death or life imprisonment and that the period of probation shall not exceed five years. The power to suspend sentence and to grant probation to begin after serving sentence on another indictment is not prohibited by the words of the Act. It is within the broad terms granting power to place the defendant on probation "for such period and upon such terms and conditions" as the trial court deems best. It should be held to be included in the grant of power unless the history and purpose of the Act forbid giving the words used their natural and usual broad meaning

2. The history and purpose of the Probation Act support this interpretation. Prior to the Probation Act of 1925, the only amelioration of punishment for a Federal crime was a Presidential pardon, commutation of sentence for good behavior, Act of June 21, 1902, c. 1140, Sec. 1, 32 Stat. 397 (18 U. S. C., Sec. 710), parole, Act of June 25, 1910, c. 387, Sec. 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650 (18 U. S. C., Sec. 714), and the practice of suspending sentence. Executive clemency is exercised only in the most exceptional case and parole does not operate until the prisoner has served one-third of his total sentence.

The need for a probation system, and the example of the beneficial operation of probation systems under the laws of the States, were the cause, at least in part, for the practice of suspending sentence permanently in some Federal trial courts and committing the defendant to the supervision of state probation officers or volunteers. *United States* v. *Murray*, 275 U. S. 347, 354. In 1916, this Court held in *Ex parte United States*, 242 U. S. 27, that Federal trial courts had no power to suspend sentences indefinitely. That decision and the need for a probation system resulted in the enactment of the present Probation Act.[1]

[1] The Annual Report of the Attorney General for the fiscal year ended June 30, 1936, page 220, Table 9G, shows the growth of probation from 4,281 probationers under supervision on July 1, 1930, to 22,027 on July 1, 1936. Table 8D of that report, page 206, discloses that 2,011 parolees and 1,578 conditional releasees were under supervision on July 1, 1936.

The purpose of the Probation Act is the rehabilitation of offenders. In *Burns* v. *United States*, 287 U. S. 216, this Court stated, at p. 220:

> To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. * *. *

The purpose of the statute is achieved by the practice followed in the present case. The trial court, in the exercise of the broad discretion to individualize each case and the particular situation of each offender, may use this method of sentence to accomplish a supervision over the offender which would not be accomplished either by parole alone or probation alone on concurrent or consecutive sentences or by probation on one sentence concurrent with imprisonment upon another sentence.

The usefulness of this method of administering the Probation Act is strikingly disclosed by a consideration of the type of sentence pronounced in Federal criminal cases during the last Government fiscal year from July 1, 1936, to June 30, 1937. A table which has been prepared for the Annual Report of the Attorney General for that year and is found in the Appendix, pp. 30–31, contains this information. It appears that suspended sentences and probation in some form were granted in 15,597

cases or 37.1% of the total of 41,961 cases of sentences. Probation was granted in conjunction with imprisonment and fine, as in the present case, in 2,373 or 15.2% of the 15,597 cases in which some form of probation was granted or 5.7% of the total of 41,961 cases. In 3,976 cases probation was granted in conjunction with imprisonment alone, and in 943 cases with a fine only. In 8,305 cases probation was granted without either imprisonment or fine. It appears from these figures that the trial courts, in the exercise of their discretion under the Probation Act, frequently utilize the method of sentence involved here which has the approval of their experience.

It is noted that Immigration Act violations, which are involved in one indictment of the present case on which probation was granted (R. 19), constitute the one class of offenses in which probation was granted in conjunction with other punishment in more cases, 1,217 cases, than probation was granted alone, 288 cases, without any other sentence.

3. The Probation Act is a remedial statute which should receive a distinctly benevolent interpretation to accomplish its purpose. *Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d). The history of the Act discloses that its purpose in part was to permit trial courts to continue the practice of suspending sentence which prevailed before *Ex parte United States,* 242 U. S. 27. Although the extent

of the practice of suspending sentences is not reflected in numerous judicial decisions, *Ex parte United States*, 242 U. S. 27, 50–51, at least one instance may be noted in which a trial court suspended imposition of a sentence to begin at the expiration of another sentence. *United States* v. *Blaisdell*, 3 Benedict 132, 145, Fed. Cas. No. 14608 (S. D. N. Y.). This instance furnishes some evidence that it was the practice to suspend sentence in this manner. The Act granted the power to continue the practice of suspending sentence and in the absence of any words of limitation it may be supposed that Congress intended the power to be exercised in this respect in the same manner as before the statute.

4. The weight of judicial authority supports this interpretation. In *Burns* v. *United States*, 287 U. S. 216, although this Court did not expressly consider the power to grant probation on one count to run concurrently with a sentence of imprisonment on another count, which was involved there, it was held that a summary proceeding to revoke that probation for misconduct was valid and that upon the facts no abuse of discretion appeared. This decision on the revocation of probation in these circumstances assumed, if it does not decide, that the trial court had the power to impose a sentence of this character. If such a suspended sentence, with probation on one count to run concurrently with a sentence of imprisonment on another

count, is proper, suspension of sentence and probation to begin at the expiration of another sentence is permitted by the Probation Act.

In addition to the decision of the court below in the present case which involves separate indictments, the suspension of sentence on one count of an indictment with probation to begin at the expiration of sentence on another count has been approved in *White* v. *Steigleder,* 37 F. (2d) 858 (C. C. A. 10th) and *Deliz* v. *Rexroad,* 18 F. Supp. 362 (M. D. Pa.).

5. The only contrary view is expressed by *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2d), certiorari, sought on behalf of the defendant, denied, 299 U. S. 596. The expression of this view, however, admitted by the court to be unnecessary to its decision, is unsatisfactory in reasoning, misapplies *United States* v. *Murray,* 275 U. S. 347, and is substantially contrary to the same court's holding in the present case. In the *Greenhaus* case the defendant was sentenced to imprisonment for five years on the even numbered counts of a mail fraud indictment with sentence to begin at the expiration of sentence for three years on the odd numbered counts and to be suspended and the defendant placed on probation. While the defendant was at large on probation after service of the prison term on the odd numbered counts, probation was revoked for violation of its conditions, and the defendant was ordered to serve the sentence on the even numbered counts. On appeal

from the order of revocation the defendant contended that the sentence on the even numbered counts, as well as the suspension of that sentence, was void. The Second Circuit Court of Appeals affirmed the order revoking probation and committing the defendant to imprisonment, and held that the original sentence was valid and must be served. The court then went beyond the decision required by the appeal and, deeming it "important to determine the powers of the courts to suspend sentences and admit to probation in future cases", expressed the view that the suspension of sentence was unlawful because of the reasoning of this Court in *United States* v. *Murray, supra.*

The Circuit Court of Appeals stated that the reasoning of the *Murray* case settled the law that probation cannot be conditional upon the serving of a prior portion of a sentence and then stated that sentences on separate counts of an indictment constituted one sentence under the Probation Act. The *Murray* case, however, held only that immediately upon imprisonment to serve the sentence the trial court lost power to grant probation, and did not hold that before imprisonment the court had no power under the Probation Act to provide for probation to begin after service of part of the sentence. It has been held, distinguishing the *Murray* case on this ground, that a trial court has power to suspend a sentence in part and to grant probation to begin after service of part of the sentence. *United States* v. *Wittmeyer,* 16 F. Supp. 1000 (D. Nev.).

Assuming, as some courts have stated, *White* v. *Burke,* 43 F. (2d) 329 (C. C. A. 10th); *United States* v. *Praxulis,* 49 F. (2d) 774 (W. D. Wash.); *Archer* v. *Snook,* 10 F. (2d) 567 (N. D. Ga.), that under the reasoning of the *Murray* case such a division of one sentence would interfere with parole in a manner Congress did not intend, it does not follow that the sentences on several counts to run consecutively in the *Greenhaus* case are the same as one sentence on one count of one indictment for purposes of the Probation Act. Cases holding that for purposes entirely different from the Probation Act separate sentences are treated as one sentence, such as *United States ex rel. Mignozzi* v. *Day,* 51 F. (2d) 1019 (C. C. A. 2d), and *Thompson* v. *United States,* 204 Fed. 973 (C. C. A. 9th), relied upon by the court below in the *Greenhaus* case, are not applicable. In other situations sentences on separate counts or separate indictments are treated as separate and distinct sentences. *In re Mills,* 135 U. S. 263; *In re Henry,* 123 U. S. 372; *Nashimoto* v. *Nagle,* 44 F. (2d) 304 (C. C. A. 9th); *Johnson* v. *United States ex rel. Pepe,* 28 F. (2d) 810 (C. C. A. 2d); *Ex parte Farlow,* 272 Fed. 910 (D. C. N. D. Ga.); *United States* v. *Blaisdell,* 3 Benedict 132, Fed. Cas. No. 14608 (S. D. N. Y.).

No reason appears from the language or purpose of the Probation Act to warrant limiting its operation by applying a rule that separate sentences on different counts or on different indictments are to be treated as one sentence. Indeed, where such a

result is intended for purposes of computing commutation of sentence (18 U. S. C., Sec. 710) or eligibility for parole (18 U. S. C., Sec. 714) Congress has expressed that intention. In the absence of such expression in the Probation Act suspended sentences on different counts or indictments should be treated as separate sentences.

Nothing in *United States* v. *Murray, supra,* suggests that sentence on one indictment may not be suspended and probation granted to begin at the expiration of a sentence on another indictment. This Court held that the power to suspend a sentence and grant probation ceased at the moment imprisonment began on that sentence. This Court relied upon the consideration that the power of parole operates during the period of imprisonment, and upon the consideration that a purpose of the Probation Act was to permit rehabilitation of first offenders without requiring them to suffer the evils of incarceration, as the basis for the conclusion that Congress did not intend that probation could be granted on a sentence after the offender began to serve it and thus came under the power of parole. No overlapping or interference of the complementary powers of probation and parole occurs here because the power of probation was exercised before imprisonment and before the power of parole could arise.

The consideration that one purpose of the Probation Act was to promote the rehabilitation of first offenders without imprisonment is not a suffi-

cient basis for a conclusion that if any imprisonment is required on one indictment no probation may be granted on another indictment for a connected or related offense. Probation in connection with imprisonment may exercise a beneficent control over offenders. No reason suggests that the benefits of the Probation Act are to be restricted to cases in which no imprisonment is ordered or to offenders who have never been imprisoned. Certainly the trial courts have power under the Probation Act to place on probation one who has been imprisoned for a former offense.

The language, history, and humanitarian purpose of the Probation Act support the construction, conducive to its flexible administration, that it permits the practice of suspending sentence on one indictment, or one count of an indictment, to begin at expiration of sentence on another indictment, or another count. Therefore, the order of probation was valid.

II

THE ORDER PURPORTING TO REVOKE THE ORDER OF PROBATION AND TO TERMINATE THE PROCEEDINGS AGAINST THE PETITIONER WAS VOID FOR WANT OF JURISDICTION

The court below correctly held that the sentencing judge had no power to revoke the order of probation and to terminate the proceedings when, twenty months after his service in the Southern District of New York was completed, he assumed

the jurisdiction to act as a court for the Southern District of New York while sitting in the Eastern District (R. 154).

The sentencing judge retained no jurisdiction to revoke probation under either Judicial Code, Sec. 18, as amended (28 U. S. C., Sec. 22), or the Probation Act, the only sources of power in this matter.

1. Judicial Code, Sec. 18, as amended by the Act of September 14, 1922, c. 306, Sec. 5, 42 Stat. 839, provides in part:

> Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to *decide* all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; * * *.

The power granted by this section is limited to motions for new trials and to acts required to be performed in order to prepare for appellate review any case tried by the assigned judge, which are not involved here, and to decisions on "all matters which have been submitted to him within such district." This provision grants power to perform functions merely incidental and supple-

mentary to duties undertaken and performed by the assigned judge while present and acting in the designated district. No power to initiate any proceeding is given. No power is granted to hear or decide any matter not submitted to him in the designated district even though it may be a matter in a case tried or heard by him in the designated district.

The limited extent of this power is indicated by its evident purpose, which is to permit the designated judge, after he has left the district and his designation has expired, to decide matters submitted to him within the designated district and perform those incidental procedural functions which no other judge, unfamiliar with the case, could so easily perform.

The cases which consider the validity of orders made by a designated judge after expiration of his designation and after his departure from the district, in a case he has heard or tried in the district, illustrate the purely incidental and supplementary nature of these permissible judicial acts. *Clarke* v. *Chicago, B. & Q. R. Co.,* 62 F. (2d) 440 (C. C. A. 10th); *United States* v. *Goldstein,* 271 Fed. 838 (C. C. A. 8th); *Apgar* v. *United States,* 255 Fed. 16 (C. C. A. 5th); *Hicks* v. *United States Shipping Board Emergency Fleet Corporation,* 14 F. (2d) 316 (S. D. N. Y.); *Gay* v. *Hudson River Electric Power Co.,* 190 Fed. 812 (C. C. N. D. N. Y.); *Cheesman* v. *Hart,* 42 Fed. 98 (C. C. Colo.).

2. Revocation of the order of probation and discharge of the probationer from further supervision was not a decision by Judge Inch on a "matter submitted to him within such district" in virtue of the probation power of the trial court under the Probation Act. The matter submitted to Judge Inch within the Southern District of New York under the Probation Act was the question whether probation should be granted in view of the nature of the offense and the individual situation of the offender at that time. The order granting probation was the decision on the matter submitted to Judge Inch under the Probation Act within the Southern District of New York.

The motion to discharge the defendant from probation raised for the first time in the Eastern District of New York new matters under the Probation Act which were not before Judge Inch when he granted probation. The motion for discharge presented the question of the defendant's conduct during probation and the need for further supervision. In this case it also presented the contention that the defendant was suffering from angina pectoris and that the probationary status had produced a mental condition (R. 28–29).

Revocation of probation is a summary proceeding which may be conducted in a wholly different manner from the trial in which the defendant is convicted or enters a plea of guilty or *nolo contendere*. *Escoe* v. *Zerbst*, 295 U. S. 490, 493; *Burns*

v. *United States,* 287 U. S. 216, 222–223; *Pritchett* v. *United States,* 67 F. (2d) 244 (C. C. A. 4th); *United States* v. *Antinori,* 59 F. (2d) 171 (C. C. A. 5th); *Jianole* v. *United States,* 58 F. (2d) 115 (C. C. A. 8th); *United States ex rel. Grossberg* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d); *United States* v. *Gargano,* 25 F. (2d) 723 (E. D. La.); *Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d); *Riggs* v. *United States,* 14 F. (2d) 5, 12 (C. C. A. 4th), certiorari denied, 273 U. S. 719; 36 Ops. A. G. 186, 190.

The Probation Act provides that the *court* shall have power to grant probation, that the *court* may revoke or modify probation, and that the *court* may discharge the probationer from further supervision. Probation may be granted (*Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d)) or revoked (*United States* v. *Greenhaus,* 14 F. Supp. 368 (S. D. N. Y.)) by any judge of the trial court and not solely by the judge who imposed the sentence.

The difference between the facts considered when probation is granted and the facts considered when probation is revoked and the probationer discharged, and the difference between the court proceeding in which probation is granted and the summary proceeding in which probation may be revoked by a judge of the trial court who did not grant the probation, indicate that when a designated judge grants probation the revocation of pro-

bation and discharge of the probationer is not a matter "submitted to him within such district" within Judicial Code Section 18, as amended.

3. In the Probation Act Congress gave the trial court complete supervision over the probationer for the probation period and also for the period of the maximum sentence which might have been imposed. The purpose of probation is the continuance of the trial court's close supervision over the offender in order to assist his rehabilitation. *Burns* v. *United States,* 287 U. S. 216, 222. The jurisdiction of the trial court over the case and over the offender after probation is granted is continued until changed conditions brought to the court's attention require revocation of probation or discharge of the probationer from further supervision or until the maximum period of supervision expires. *United States* v. *Antinori,* 59 F. (2d) 171, 172 (C. C. A. 5th).

Section 4 of the Probation Act, as amended (18 U. S. C., Sec. 727) indicates this detailed supervision over the probationer by providing that the probation officer shall keep informed concerning the conduct and condition of each probationer under his supervision, shall report thereon to the court placing such person on probation, shall use all suitable methods to aid the probationer, and shall keep records of his probation work.

The exclusive character of the trial court's jurisdiction over the probationer is indicated by the fact that he may not be arrested and tried for a crimi-

nal offense by a State court during the period of his probation. *Grant* v. *Guernsey*, 63 F. (2d) 163 (C. C. A. 10th), certiorari denied, 289 U. S. 744; *Dillingham* v. *United States*, 76 F. (2d) 35 (C. C. A. 5th).

This complete supervision of the probationer by the trial court is impaired in a manner Congress did not intend if an assigned and designated judge from another district, who sentences an offender and grants probation, may discharge the probationer after his designation has expired and after he has returned to his own district.

The present case is an illustration of the manner in which such a practice may impede proper administration of the Probation Act. Long after he returned to his own district the judge entertained an application in his chambers and outside of the district of the trial court to determine whether the probationer should be discharged. Neither the probation officer who was required by the Probation Act to report to the court in which the offender was placed on probation nor the United States Attorney for that district (R. S., Sec. 771, 28 U. S. C., Sec. 485) had any power to represent the United States in a proceeding to discharge the probationer outside of the district for which they were appointed. Inconvenience in the administration of the Probation Act will be caused if the United States Attorney, who conducted the trial in which probation was granted, and the probation of-

ficer, who has knowledge of the conduct of the probationer, may be required to attend a discharge proceeding outside of the district where the records of the trial and the probation officer's records are kept.

These considerations support the conclusion that Judge Inch lacked jurisdiction to make the order dated December 16, 1935, which purported to revoke the order of probation and to discharge the probationer from further supervision and that, therefore, that order of revocation and discharge was void.

III

EVEN ASSUMING THE JURISDICTION OF THE TRIAL JUDGE TO MAKE THE ORDER PURPORTING TO DISCHARGE PETITIONER FROM SUPERVISION, THAT ORDER DID NOT RELEASE THE PETITIONER FROM THE JURISDICTION OF THE TRIAL COURT TO IMPOSE SENTENCES ON TWO INDICTMENTS

The order signed by Judge Inch provided that the order of probation "be, and the same is hereby, revoked, and the defendant is discharged from further supervision, and the proceedings against him in this cause be, and the same are hereby, terminated" (R. 29).

Assuming for this argument that Judge Inch had the power to discharge the petitioner from the probation which he had granted, the order of discharge served only to discharge the petitioner from probationary supervision, and did not release the

petitioner from the jurisdiction of the trial court over the petitioner for the period after the termination of probation and until the end of the maximum period to which he might have been sentenced.

It is clear that under Section 2 of the Probation Act the trial court has jurisdiction of the offender after the period of probation and until the expiration of the maximum period for which he might have been sentenced. *Burns* v. *United States,* 287 U. S. 216, 221; *United States ex rel. Grossberg* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d); *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th). After the period of probation has expired the defendant may be brought before the court and required to serve a sentence. *Mason* v. *Zerbst,* 74 F. (2d) 920 (C. C. A. 10th). Even after the court expressly discharges the defendant from probation he may be brought before the court and be sentenced within the time of the maximum sentence which might have been given to him originally. *Crowder* v. *Aderhold,* 46 F. (2d) 357 (N. D. Ga.).

In the present case the order discharging the petitioner from probationary supervision ordered that the proceedings against him be terminated. Section 2 of the Probation Act provides that the trial Court may "discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable." This provision may be

construed as giving the trial court the power to terminate only the proceedings of probationary supervision, but leaving jurisdiction in the trial court to recall the offender at any time within the period of maximum sentence. This provision may be given the broader construction which would permit the trial court to terminate the entire proceedings so completely that no further action could be taken against the defendant. *United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5th); *United States* v. *Maisel*, 26 F. (2d) 275 (S. D. Tex.).

The order of revocation in the present case states that "the proceedings" are terminated. It does not indicate beyond any doubt which effect Judge Inch intended. It was signed during the probation period, and the facts recited as the basis for the order indicate that release from probationary supervision was the principal purpose of the application. It does not expressly indicate that the proceedings terminated included any possible proceeding after the period of probation expired. The order does not refer to all proceedings or the entire proceedings. If it had been signed after probation had expired, as in *United States* v. *Maisel, supra*, it would be clearer that the general reference to "the proceedings" meant all proceedings after expiration of probation.

Judge Inch's remarks on the hearing to resettle his order of revocation (R. 46, 47, 58) and his conclusion that the word "probationary" should ap-

pear before the word "proceedings" in that order (R. 65) show clearly that a termination of the trial court's jurisdiction was not intended.

Any doubt as to the meaning of the order should prevent a construction entirely terminating the district court's *jurisdiction.* The court had jurisdiction before this order was signed. Very clear language should be required to terminate that jurisdiction.

This construction to the effect that the order did not discharge all proceedings after expiration of probation is supported by the consideration that the order was made by the assigned judge after he left the district. Although he might believe that he still had power to terminate a probation he had granted, it is not to be assumed that he intended to go further than the application absolutely required and terminate the jurisdiction of the court entirely.

IV

IF THE ORIGINAL ORDER OF PROBATION IS INVALID THE MOTION FOR SENTENCE ON THE TWO UNSATISFIED PLEAS OF GUILTY SHOULD HAVE BEEN GRANTED BY THE DISTRICT COURT

The court below properly observed that even though the original order of probation on the two indictments was illegal, the district court had power to impose sentence. *Miller* v. *Aderhold,* 288 U. S. 206.

The trial court is under a duty to impose sentences if the order suspending imposition of sen-

tences and granting probation is invalid. *Ex parte United States,* 242 U. S. 27, 41–42.

The fact that the petitioner has served the sentence on one indictment does not render void or satisfy the requirement for sentences on the other two wholly separate indictments. Such sentences are not additional sentences on the plea of guilty to the first indictment, but are required by the two separate pleas of guilty to the other two indictments.

CONCLUSION

The judgment of the court below properly remanded the petitioner to custody for a determination whether probation should be revoked and sentences imposed on the two indictments. Therefore, that judgment should be affirmed.

Respectfully submitted.

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NOVEMBER 1937.

APPENDIX

The statutes involved are printed in the appendix to the petitioner's brief. The following table has been prepared for the Annual Report of the Attorney General for the fiscal year ending June 30, 1937:

TABLE 2G.—*Type of sentence of convicted defendants in criminal cases, by offense, fiscal year 1937*

Offense	Total	Imprisonment only	Imprisonment and Fine	Fine only	Probation or suspended sentence				
					Entire sentence probated	Punishment followed by probation			Other [1]
						Imprisonment only	Imprisonment and fine	Fine only	
Counterfeiting and forgery	2,148	634	689	13	441	197	126	34	13
Customs Act violations (not elsewhere classified)	289	114	9	38	74	39	7	7	1
Embezzlement and fraud	431	216	43	27	78	41	17	7	2
Escape, flight, and mutiny	124	92	8	4	14	.....	2	.....	4
Extortion and racketeering	6	4	.....	.....	2	.....	.....	.....	.....
Immigration Act violations	4,278	2,679	71	8	288	1,176	37	4	15
Internal Revenue Act violations (not elsewhere classified)	123	3	20	33	33	4	8	19	1
Interstate Commerce Act violations	102	4	3	61	27	.....	1	6	.....
Kidnaping	61	49	6	.....	1	1	4	.....	.....
Larceny:									
National Motor Vehicle Theft Act violations	1,730	1,180	105	3	273	135	17	11	6
National Stolen Property Act violations	16	6	1	.....	7	1	.....	.....	1
Theft from interstate commerce	652	409	60	7	98	48	23	6	1
Theft or illegal possession of Government property	347	191	16	8	87	34	5	6	.....
Not otherwise specified	1	.....	.....	.....	1	.....	.....	.....	.....
Liquor law violations:									
Customs Act violations	121	69	5	5	27	5	2	8	.....
Indian Liquor Law violations	1,143	39	763	16	218	13	62	30	2
Internal Revenue Act violations	20,162	4,332	6,085	767	4,703	1,578	1,895	663	139
Prohibition Act violations	15	1	3	.....	3	4	4	.....	.....
Not otherwise specified	109	10	12	26	31	5	5	30	.....
Narcotic Drug Act violations	2,450	1,246	537	50	306	210	53	35	14

[1] Includes convicted defendants with sentences deferred, continued without day, etc., and those sentenced to immediate deportation.

TABLE 2G.—*Type of sentence of convicted defendants in criminal cases, by offense, fiscal year 1937*—Continued

Offense	Total	Imprisonment only	Imprisonment and Fine	Fine only	Probation or suspended sentence				
					Entire sentence probated	Punishment followed by probation			Other
						Imprisonment only	Imprisonment and fine	Fine only	
National Bank and Federal Reserve Act violations	371	120	22	11	152	54	4	7	1
National bank robbery	75	49	18	----	3	5	----	----	----
National Bankruptcy Act violations	128	54	8	5	38	19	2	2	----
National Firearms Act	18	7	----	7	3	----	----	----	1
Postal law violations:									
Burglary	211	97	68	1	27	7	9	1	1
Counterfeiting and forgery	171	100	7	1	51	9	2	----	1
Embezzlement	320	109	21	10	104	58	10	7	1
Fraud	514	227	54	26	88	88	14	9	8
Larceny	550	309	48	1	117	55	14	2	4
Lottery promotion	34	----	2	5	20	5	----	2	----
Mailing obscene matter	118	39	3	4	50	15	3	4	----
Robbery	56	49	1	----	5	1	----	----	----
Other and not specified	260	120	8	14	71	28	7	7	5
White Slave Traffic Act violations	523	363	64	4	49	32	2	5	4
Miscellaneous Federal offenses:									
Food and Drug Act violations	351	1	----	313	24	1	1	4	7
Migratory Bird Act violations	533	36	9	424	52	3	2	1	6
Naturalization Law violations	127	57	30	7	41	3	----	6	3
Vessel Safety Regulations Act violations	209	----	----	203	6	----	----	----	----
War Risk Insurance Act violations	78	11	6	9	28	9	7	8	----
Offenses occurring in the District of Columbia, Territories, Indian, military, and other Government reservations (not elsewhere classified):									
Assault	264	181	9	6	57	6	1	3	1
Burglary	547	459	----	----	88	----	----	----	----
Criminal homicide	49	40	2	1	----	2	----	----	4
Larceny	692	429	11	2	230	14	2	4	----
Robbery	349	312	----	----	37	----	----	----	----
Sex offenses	66	51	----	----	12	3	----	----	----
All other offenses	334	129	9	76	103	12	1	1	3
All other offenses	705	157	137	170	138	56	24	14	9
Total	41,961	14,786	8,953	2,368	8,305	3,976	2,373	943	257

U. S. GOVERNMENT PRINTING OFFICE, 1938

SUPREME COURT OF THE UNITED STATES.

No. 87.—October Term, 1937.

William D. Frad, Petitioner,
vs.
John J. Kelly, United States Marshal for the Southern District of New York, United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 6, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner pleaded guilty to three indictments in the District Court for the Southern District of New York. Judge Inch, a district judge of the Eastern District of New York, who had been designated and assigned to sit in the Southern District, pursuant to R. S. 591, as amended,[1] received the pleas and imposed a sentence under the first indictment (No. C 96-116) of two years' imprisonment and $1,000 fine. Under the other indictments he made identical orders: "Imposition of sentence suspended. Probation for four years to begin after serving sentence on C 96-116. Subject to the standing probation orders of this Court." The petitioner paid his fine and served his sentence and thereupon entered upon his period of probation.

Twenty months after Judge Inch had returned to his own district, application was made to him at chambers, to discharge the petitioner from probation and to terminate the proceedings against him, pursuant to Section 2 of the Probation Act of March 4, 1925.[2] The judge directed that notice of the application be given to the probation officer of the Southern District of New York. This was done and, after a hearing on the merits in the Eastern District, at which the probation officer was present and took part, Judge Inch entered an order revoking the probation, discharging the petitioner from further supervision and terminating the proceedings against him. The order was captioned in the "United States District

[1] U. S. Code, Title 28, § 17.
[2] U. S. Code, Title 18, § 725.

Court for the Southern District of New York" and was filed in the office of the clerk of that court.

About a year later, on a petition by the probation officer of the Southern District, a judge sitting in that district authorized a warrant for the petitioner's apprehension upon a charge of violation of the terms of his probation. The petitioner was arrested and admitted to bail pending a hearing.

Thereafter the United States Attorney for the Southern District moved to vacate the order of Judge Inch terminating the probation and the proceedings. By stipulation of counsel, Judge Inch returned to the Southern District to hear the parties upon this motion but he entered no order since, meantime, the petitioner had surrendered himself to the marshal and sought a writ of *habeas corpus,* and the United States Attorney had moved before a judge sitting in the Southern District that the petitioner be sentenced on the two indictments under which sentence had been suspended.[3] The petition for the writ and the motion for sentence were heard together; the petition was granted, and the motion was denied. The Circuit Court of Appeals reversed and remanded the cause "for the consideration of the revocation of [the petitioner's] probation and for sentence if warranted."[4]

We granted the writ of certiorari because of the importance of the questions presented in the administration of the Probation Act. We hold that the judgment of the court below was right.

First. The contention that the trial court was without power to suspend the imposition of sentences on the pleas of guilty to two of the indictments and place the defendant on probation effective after completion of service of sentence on the third indictment is without merit. Based upon this contention the petitioner says that when he had completed service of the sentence imposed on indictment C 96-116 there remained no sentence against him and the term having long since expired the court was without power then to impose one.

The Probation Act (*supra*) provides, in Section 1, that United States courts having original jurisdiction of criminal actions, being

[3] In fact there were two motions. The one was for sentence on the two indictments. This apparently was not pressed. The other was for an order committing the petitioner "for the period of the unserved portion of his sentence . . . to wit, four years in a place to be designated by the Attorney General of the United States, and for such other, further, and different relief as to the court may seem just and proper."

[4] 89 F. (2d) 866.

satisfied that the ends of justice and the best interests of the public and of the defendant will be served thereby, shall have power, after conviction for any crime or offense not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," or to impose a fine and place the defendant upon probation; to revoke or modify any condition of probation or change the period thereof, provided that the period with any extensions shall not exceed five years. The act was intended to cure the lack of power indefinitely to suspend a sentence, under which district courts labored prior to the enactment.[5]

The second section provides that at any time within the probation period, or at any time after the probation period but within the maximum period for which the defendant might originally have been sentenced, the probationer may be summoned before the court and "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." The action of the trial court in suspending sentence and imposing probation on two of the indictments was in strict accordance with the authority thus explicitly conferred. The validity of the cited provisions is not open to question.[6] The mere fact that a sentence of a fine and imprisonment had been imposed upon one of the indictments in no way militated against the prescription of probation in respect of the plea of guilty under the other two.[7]

Second. The order of Judge Inch, sitting in the Eastern District, after the termination of his service in the Southern District, was null. The statute providing for designation and assignment of a district judge to sit temporarily in another district than his own does not authorize the order, and the express provisions and obvious intent of the Probation Act negate the power of any judge, other than a judge of the Southern District of New York, to make it.

The Act of March 3, 1911, Section 18, as amended,[8] provides: "Any designated and assigned judge who has held court in another

[5] Ex parte United States, 242 U. S. 27.
[6] Escoe v. Zerbst, 295 U. S. 490, 492.
[7] Compare Burns v. United States, 287 U. S. 216.
[8] U. S. Code, Tit. 28, § 22.

district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; . . . ."

When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district. But the Act goes no farther. It clearly does not contemplate that he shall decide any matter which has not been submitted to him within the designated district. A criminal trial is concluded by the judgment of sentence entered upon a plea or a verdict of guilt. By express provision of the statute an assigned judge may thereafter, notwithstanding the expiration of his term of service, hear a motion for a new trial and do all things necessary to prepare a record for an appellate court but no authority is given to hear a new matter even though that new matter may arise in the same case. An application for the termination of the probation and the proceedings against a defendant constitutes a new matter, submission of which may not be made to the assigned judge after his return to his own district. The appropriate place for its presentation is the court in which the judgment of conviction and the sentence is recorded. In the absence of express authorization no power to deal with such an application is vested in any other court.

All the relevant provisions of the Probation Act refer to the court in which the guilt of the defendant was determined and sentence imposed. The first section empowers the court having jurisdiction of the action to place the defendant upon probation, and to revoke or modify the conditions of the probation.

The second requires the probation officer, when directed by the court, to report to the court as to the conduct of the probationer; authorizes the court either to discharge the probationer from further supervision or to terminate the proceedings against him or to extend the period of probation, to issue a warrant, upon a proper showing, for the probationer's arrest and, upon a hearing, to revoke the probation or the suspension of sentence and to impose a sentence which might have originally been imposed. Section three authorizes the judge of any United States court to appoint one or more suitable persons as probation officers "within the jurisdiction and under the discretion of the judge making such appointment or of his successor." Section four places upon a probation officer the duty to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court, and such other duties as the court may direct.

Thus the trial court has complete supervision over the probationer for the period of his probation and for the term of the maximum sentence which might have been imposed. This jurisdiction is vested in the trial court and in no other. To hold that a judge of another district, merely because he had temporarily sat at the trial and conviction of a defendant and imposed sentence, could, from that other district supervise, extend, modify or terminate the probation, would be to ignore the intent of the law. It would moreover result in confusion and inconvenience in the administration of the probation act. It would mean that the United States Attorney and his assistants, and a probation officer of the court in which the judgment is recorded, would be required to go to distant parts to be heard upon the merits of any application by the probationer and that the probationer, at his will, could institute proceedings either before a judge of the court in which his conviction is recorded or the judge in a different district who had been a temporary member of that court. Such a possibility was certainly never intended. Probation is a system of tutelage under the supervision and control of the court which has jurisdiction over the convicted defendant, has the record of his conviction and sentence, the records and reports as to his compliance with the conditions of his probation, and the aid of the local probation officer, under whose supervision the defendant is placed. This jurisdiction is not divided between that court and a distant judge who sat by designation at the defendant's trial.

Third. What has been said indicates the answer to petitioner's argument that the probation officer of the Southern District, by appearing before Judge Inch in the Eastern District upon the application for termination of the proceedings, and the United States Attorney, by stipulating that Judge Inch might return to the Southern District to hear a motion for resettlement of his order, have waived venue or are estopped to question it. Neither of these officers could confer jurisdiction upon a designated judge to perform acts not authorized by the assignment Act outside the district of designation after his term of service had ended. They could not waive the jurisdictional requirements of the Probation Act or by their conduct confer jurisdiction on a judge of another district to act for the trial court in which alone the statute vests the power to deal with the subject.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.